Petition

81-1844
No.

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

GORDONSVILLE INDUSTRIES, INC., - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, - - - - Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 5, 1982

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QUESTIONS PRESENTED

1. Did the National Labor Relations Board, an administrative agency of the United States, violate Petitioners' right to Due Process under the Fifth Amendment to the Constitution of the United States by suppressing and refusing to supply to the Petitioner at the hearing below unprivileged signed statements of potential witnesses relevant to whether or not the union represented a majority of employees?

2. Did the National Labor Relations Board violate Petitioner's right under the Fifth Amendment to the Constitution of the United States to Due Process and Equal Protection by enforcing its own subpoena and quashing the Petitioner's subpoena of equally relevant unprivileged materials?

3. Did the National Labor Relations Board, in issuing an Order that Petitioner bargain with the Union, apply the National Labor Relations Act in a manner violative of the holding of the Supreme Court in *NLRB* v. *Gissel Packing Co., Inc.*, 395 U. S. 575, 89 S. Ct. 1978, 23 L. Ed. 2d 547 (1969)?*

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*The caption of the case in this Court contains the names of all parties to the proceedings below.

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OPINIONS BELOW

The final Order of the United States Court of Appeals for the District of Columbia Circuit, entered below on January 19, 1982, is not reported but appears in the Appendix hereto. App. A. The Order denying Petitioner's Petition for Rehearing, entered below on February 12, 1982, is not reported but appears in the Appendix hereto. App. B. The Decision and Order of the National Labor Relations Board (NLRB) was entered below on September 30, 1980, and is reported at 252 NLRB No. 54 (1980) and appears in the Appendix hereto. App. C. The Decision and Recommended Order of the Administrative Law Judge (ALJ) upon which the NLRB Decision and Order, dated November 8, 1979, is based is not reported but appears in the Appendix hereto. App. D.

JURISDICTIONAL STATEMENT

The final Order of the United States Court of Appeals for the District of Columbia Circuit was entered on January 19, 1982. A seasonable Petition for Rehearing was denied on February 12, 1982. This Petition is filed within ninety (90) days of February 12, 1982. Jurisdiction of this Court is invoked pursuant to the provisions of 28 *U.S.C.* §1254(1). On March 5, 1982, the Court of Appeals stayed the issuance of its mandate pending the filing of this Petition, pursuant to Federal Rule of Appellate Procedure 41(b).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution

First Amendment:

"Congress shall make no law . . . ; or abridge the freedom of speech; or of the press."

United States Constitution

Fifth Amendment:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Administrative Procedure Act:

Section 7(c), 5 U.S.C. § 556(d):

". . . Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. . . ."

National Labor Relations Board:

Section 8(a)(1), (3), and (5), 29 U.S.C. § 158(a)(1), (3), and (5):

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . [proviso omitted];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 8(c), 29 U.S.C. § 158(c):

"The expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Rules and Regulations of the National Labor Relations Board:

Section 102.39, 29 C.F.R. § 102.39:

"Any such proceeding shall, as far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

Section 102.118, 29 C.F.R. § 102.118:

"(a)(1) Except as provided in section 102.117 of these rules respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D. C., and in control of the Board; or of the general counsel if the document is in a regional office of the agency or is in Washington, D. C., and in the control of the general counsel. Nor shall any

such person testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or the general counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the chairman of the Board if the person is in Washington, D. C., and subject to the supervision or control of the Board; or of the general counsel if the person is in a regional office of the agency or is in Washington, D. C., and subject to the supervision or control of the general counsel. A request that such consent be granted shall be in writing and shall identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served on any such person or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule."

"(2) No regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee

of the Board shall, by any means of communication to any person or to another agency, disclose personal information about an individual from a record in a system of records maintained by this agency, as more fully described in the notices of systems of records published by this agency in accordance with the provisions of section (e)(4) of the Privacy Act of 1974, 5 U.S.C. Sec. 552a(e)(4), or by the Notices of Government-wide Systems of Personnel Records published by the Civil Service Commission in accordance with those statutory provisions, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be in accordance with the provisions of section (b)(1) through (11), both inclusive, of the Privacy Act of 1974, 5 U.S.C. Sec. 552a(b)(1) through (11)."

"(b)(1) Notwithstanding the prohibitions of subsection (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the administrative law judge shall, upon motion of the respondent, order the production of any statement (as herein defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination."

"(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the general counsel to deliver such statement for the inspection of the administrative law judge in camera. Upon such de-

livery the administrative law judge shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that he may, in his discretion, decline to excise portions which, although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With such material excised the administrative law judge shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholding, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purposes of determining the correctness of the ruling of the administrative law judge. If the general counsel elects not to comply with an order of the administrative law judge directing delivery to the respondent of any such statement, or such portion thereof as the administrative law judge may direct, the administrative law judge shall strike from the record the testimony of the witness."

"(c) The provisions of subsection (b) of this section shall also apply after any witness has testified in any post-election hearing pursuant to section 102.69(d) and any party has moved for the production of any statement (as hereinafter defined) of such witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the administrative law judge under subsection (b) of this section shall be exercised by the hearing officer presiding."

"(d) The term 'statement' as used in subsections (b) and (c) of this section means: (1) a written statement made by said witness and signed or otherwise adopted or

approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to any agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement."

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

GORDONSVILLE INDUSTRIES, INC., - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT OF THE CASE

This is a labor relations case, involving the propriety of a National Labor Relations Board, "NLRB", Order that Gordonsville Industries, Inc., "Petitioner", bargain with Amalgamated Clothing and Textile Workers Union, "Union", even though Petitioner's employees at Gordonsville voted against the Union in a representation election. In the instant case the NLRB supressed unprivileged information in violation of *Jencks* v. *United States,* 353 U. S. 657 (1957), preventing Petitioner from proving that the Union did not have majority status at any time. It then used an unproven majority as the basis for a bargaining order in the

aftermath of an unsuccessful union election, thus disenfranchising the eligible employee voters who had voted against the union.

Liberty Fabrics of New York, Inc. (corporate successor to Gordonsville Industries, Inc.) is a small American Stock Exchange company having approximately 1100 shareholders. The company is engaged in the business of producing fabrics for clothing manufacturers in the United States and other parts of the world. Petitioner employs approximately 400 people at its plant in Gordonsville, Virginia, which is its primary manufacturing facility.

On September 29, 1977 the Union filed an NLRB petition for a representation Election among production and maintenance employees of Petitioner at its Gordonsville plant. A Stipulation for Certification Upon Consent Election dated October 19, 1977 was voluntarily executed by the parties and an election was held December 6, 1977. The NLRB determined the final vote tally was one hundred forty-four votes for the Union, one hundred fifty-nine votes against the Union, with one ballot voided and one undetermined. The union lost the election.

The Union filed objections and charges alleging that the Petitioner committed violations of sections 8(a)(1), (3) and (5) of the National Labor Relations Act (the "Act") 29 U.S.C. §158(a)(1), (3), (5) and thereafter the Regional Director of the NLRB issued a Complaint incorporating these allegations.

On July 24, 1978, immediately prior to the NLRB hearing, General Counsel, the NLRB prosecutor under

Section 3(d) of the Act, served a six page, 31 item subpoena duces tecum upon the Petitioner, demanding production of voluminous data. App. E. Petitioner objected, filing a petition to revoke, App. F, and served its own subpoenas upon General Counsel and the Union to obtain relevant evidence pertaining to the validity of authorization cards signed by its employees.[1] App. G. The ALJ enforced the General Counsel's subpoena and a similar subpoena served upon Petitioner by the Union.[2]

The ALJ declined enforcement of the Petitioner's subpoenas in any significant respect depriving Peti-

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[1]Under *Gissel*, if it can be demonstrated by introduction of valid Union authorization cards that a union had the claim of a majority prior to an NLRB election, and if a company is guilty of "pervasive unfair labor practices which dissipate a union's claimed majority to an extent that a future fair election cannot be held, the union can be certified without an election. Thus, in the instant case, validity of authorization cards is a critical issue.

[2]Pursuant to Section 102.118 of the NLRB's *Rules and Regulations*, 29 C.F.R. § 102.118, Petitioner appealed to the General Counsel in Washington, pointing out that the materials it sought were relevant and comparable in scope to that sought by General Counsel and the Union, and that to require the Petitioner to produce such materials, while denying the Petitioner access to comparable information violated Equal Protection and Due Process clauses and Section 12 of the Administrative Procedure Act, 5 U.S.C. § 559. App. H. General Counsel denied relief. The NLRB and Union subpoenas were enforced by the United States District Court for the Eastern District of Virginia. The United States Court of Appeals for the Fourth Circuit declined to stay this enforcement pending appeal.

A second effort to obtain release of the materials sought by Petitioner also proved fruitless. *See*, Letter to John S. Irving,

(Footnote continued on following page)

tioner of access to certain questionnaires (App. L) which are a principal subject of this Petition.[3]

General Counsel, prior to the hearing below, mailed blank questionnaires to Petitioner's employees requesting that the employee complete it and return it by mail. Thereafter, if completed questionnaires were not returned to General Counsel, Union representatives took additional questionnaire forms to the employee's home, and had them completed (Tr. 270-276). While some questionnaires were returned to the Board by mail and others were delivered to the Board by the Union, because Petitioner's subpoena of union materials was quashed, nothing in the record indicates whether the Union turned all completed questionnaires over to the General Counsel.

The information in the questionnaires has unique relevancy in this case because of the method used by General Counsel to prove the authenticity of the bulk of the cards.[4] General Counsel relied significantly

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(Footnote continued from preceding page)

General Counsel, of 9-5-78, and his telegram in response dated 9-20-78, referenced to Cases Nos. 5-CA-9050, 5-CA-9308, and 5-RC-10242. These documents are reproduced as App. J and K.

[3]In the course of this hearing even the ALJ suggested General Counsel consider allowing the Petitioner access to questionnaires signed by employees who allegedly signed authorization cards. (Tr. 368, 390-391 relevant portions of the Transcript references are set forth in App. M.) This suggestion was frustrated by General Counsel.

[4]The questionnaires, which were executed by employees, solicited information about the circumstances surrounding the signing

(Footnote continued on following page)

upon the testimony of "secondary witnesses", *i.e.*, the persons who presented the card to an employee for signature, or a purported witness to the signing of the card, rather than upon the testimony of the employee himself, the "primary witness". Approximately 112 cards of the approximately 200 cards ultimately held

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(Footnote continued from preceding page)
of authorization cards (*See*, App. L). The following questions, among others, appeared on the questionnaire:

6. Did you sign the enclosed authorization card?
7. Did you sign the card on the date shown?
9. Did you write the date on the card yourself?
10. Who gave you the card?
11. Who did you give it to after you signed it?
12. Who was present when you signed the card?
13. When you signed the card, were you told "it was for an election only? it was to authorize the Union to represent me? it was for an election and to authorize the Union to represent me?"
14. Did you read the card before you signed it?

(The obvious relevancy of the questionaire is that a card an employee did not sign, or signed in the wake of a false representation that the purpose of the card was only to get an election, or under coercion, or under circumstances where the employee would not have known the significance of what he was signing, cannot be used to prove a majority under *Gissel*.)

by the Board to be authentic were introduced through "secondary witnesses".[5]

The General Counsel's practice in the hearing was that if a card was introduced through the testimony of the individual employee who supposedly signed the card, the questionnaire, if there was one, was supplied to the Petitioner at the hearing on Petitioner's request after the employee had testified. This comports with the requirements of Section 102.118(b)(1) of the NLRB *Rules and Regulations* that signed statements of an individual witness be supplied to an adverse party by General Counsel *after that witness has testified.*

However, where an individual *other than the signer* was the witness through whom the card of an employee was introduced, the General Counsel refused to deliver questionnaires to Petitioner in the course of the hearing, *even when they admittedly were in existence and directly related to a card which was the subject of testimony.*[6] Not only were such questionnaires relevant to the validity of the card to which such questionnaire directly referred, but each questionnaire directly

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[5]20 witnesses introduced 112 cards, an average of 5.6 cards each. One witness, Figgins, personally introduced 23 cards. Some cards proved by secondary witnesses were ultimately declared unreliable. See Footnotes 19 and 20.

[6]The fact that so many cards of available employees were introduced through "secondary witnesses" might lead one to suspect that the text of a refused questionnaire (which the NLRB's own Regulations would have required be furnished in the course of the hearing if the primary witness had himself testified) was not supportive of the card's authenticity.

bore on the critical issue of the credibility of the secondary witness who was the sponsor of the card and, therefore, upon the validity of all the cards put into the record by that individual witness. (See, *e.g.*, footnotes 19 and 20.)

On November 9, 1979, over one year after the close of the hearing the ALJ issued his recommendations which the NLRB rubber stamped on all significant issues on September 30, 1980.[7] While Petitioner's Brief and Exceptions detailed arguments relating to the General Counsel's egregiously erroneous suppression of the questionnaires, the NLRB in its Opinion conspiciously avoided dealing with the question of

[7]The ALJ held that the bargaining unit on September 26, 1977 contained 333 voters and that approximately 167 cards constituted a majority. He held that approximately 200 of the cards introduced were valid. 112 cards were introduced through secondary witnesses. The General Counsel voluntarily produced at the hearing 41 questionnaires executed by *primary witnesses*, i.e., the employee who signed the card himself, and admitted having questionnaires signed by 29 employees whose cards were introduced through secondary witnesses, which he declined to produce. The number of questionnaires in the possession of the Union which for one reason or the other were not turned over to the NLRB is not in the record since the NLRB quashed Petitioner's subpoena of them from the union. Likewise, the record does not indicate how many questionnaires existed which General Counsel did not admit having either, because Petitioner for a significant time at the beginning of the hearing did not know of the questionnaire's existence and therefore did not ask for them specifically or because, as in the case of the Lamb questionnaire, which General Counsel initially denied having (Tr. 556) but later found (Tr. 578) and used for cross-examination (Tr. 2884-2888; App. M), they had been "lost." *If questionnaires of signers of cards who did not testify existed in the same ratio as questionnaires of signers who did, then approximately 46 questionnaires never saw the light of day.*

whether it had the right to withhold the questionnaires, and only repeated its own obvious rule that employee statements were available after the individual employee had testified. *See,* App. C, Page 4 n.1. Inexplicably, the United States Court of Appeals for the D. C. Circuit affirmed the NLRB without opinion, denying Petitioner Due Process.

The ALJ and thereafter the NLRB, after suppressing relevant evidence in the manner described above, held that (a) the Union in September, 1977 obtained a majority of the cards, (b) Petitioner had violated the Act, and (c) under *Gissel* a bargaining order should issue because of Petitioner's alleged violations before and after the election. It will become apparent *infra* that the timing or magnitude of the alleged violations was not such that issuance of the bargaining order was proper under *Gissel.*

REASONS FOR GRANTING THE WRIT

A. The NLRB Violated Petitioner's Due Process Rights in Suppressing the Questionnaires.

The case of *Jencks* v. *United States,* 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957) stands for the proposition that a Defendant is entitled to inspect investigatory documentary materials in the hands of a governmental prosecutor to determine whether to use them in his defense. *Jencks* does not confine the governmental obligation to supply materials to the portion of a hearing or trial occurring after the witness creating the document has testified, or to documentary

evidence created solely by a testifying witness. This Court stated:

> We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, *the defense must initially be entitled to see them to determine what use may be made of them.* Justice requires no less. *Jencks,* 353 U. S. at 608-609 (emphasis added).

The Second Circuit in *NLRB* v. *Adhesive Products Corp.,* 258 F. 2d 403 (2d Cir. 1958) which specifically applied the *Jencks* doctrine to NLRB proceedings would expressly require production of all questionnaires in the instant case. The Second Circuit in *Adhesive Products* stated:

> In its decision in Jencks, the Court referred to its holding in Goldman, but then continued "(w)e now hold that petitioner was entitled to an order directing the Government to produce for inspection *all reports * * * touching the events and activities as to which (the witnesses) testified at the trial.* We hold, further, that the petitioner is entitled to inspect the reports to decide whether to

> use them in his defense." 353 U. S. at page 668. The Court did not consider it relevant that the witnesses had not testified that they refreshed their recollection by referring to these documents, and also it expressly held that it was unnecessary for the party demanding production and inspection to lay a preliminary foundation of inconsistency between the contents of the documents and the witnesses' testimony. Accordingly, these rules set forth in the Jencks decision provide an *a fortori* basis for holding that the statement demanded in the case at bar should have been produced and made available for respondent's inspection if they are applicable to civil proceedings, such as administrative hearings, as well as to criminal trials. In our opinion, logic compels the conclusion that these rules are applicable to an administrative hearing. *Adhesive Products,* 258 F. 2d at 408 (emphasis added).

Thereafter, the NLRB in *Ra-Rich Mfg. Corp.,* 121 NLRB 700, 42 LRRM 1403 (1958) stated as follows:

> The Board now holds, in conformity with the decision of the Court of Appeals for the Second Circuit in Adhesive Products, that the holding of the Jencks case applies to Board proceedings and affords parties thereto, upon proper demand, the right to production for purposes of cross-examination of pretrial statements made by witnesses who have already testified in such proceedings.

Shortly after the *Ra-Rich* holding, the *Rules and Regulations* of the NLRB were amended to require for the first time that, upon request by a respondent, the

"statement" of any witness who has testified be produced.

> (b) (1) Notwithstanding the prohibitions of subsection (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the administrative law judge shall, upon motion of the respondent, order the production of any statement (as herein defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination. 29 C.F.R. § 102.118(b)(1).

While *Ra-Rich* states that it is accepted by the NLRB that *Jencks applies to NLRB unfair labor practice proceedings,* it is obvious that the NLRB in fact intended to make its compliance with *Jencks* and *Adhesive Products* as limited as possible.

In the instant case, the General Counsel in the course of the hearing supplied questionnaires executed by employee witnesses when the questionnaires related to the execution of that employee's authorization card. However, where the questionnaires related equally directly to the card of a non-witness, they were not produced. The questionnaires are patently relevant, not only to whether an employee signed a card and the circumstances under which he may have done so, but

also to the general credibility of the proponent of the card. They describe the contact between the secondary witness and the signer of the card.[8] In this connection the Court in *Jencks* said:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony. *Jencks,* 353 U. S. at 667.

In instances where the proponent of many cards (such as Figgins, the 23 card witness) was someone other than the signer himself, is not his credibility critical? What public purpose is to be served by supression of relevant questionnaires which describe the subject matter of testimony merely because they initially were completed by a person who ultimately was not called as a witness by the prosecution.[9]

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[8]Evidence which General Counsel refused to produce should be presumed to be beneficial to the Company. *NLRB* v. *Evans Packing Co.,* 463 F. 2d 193 (6th Cir. 1973).

[9]The questionnaires were not privileged within the meaning of the Supreme Court case of *NLRB* v. *Robbins Tire and Rubber Co.,* 437 U. S. 214, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978). The ordinary purpose of "privilege" asserted by the NLRB is to protect

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General Counsel's arbitrary refusal, based upon an improper application of NLRB Rules, contravenes the well established principal that a prosecutor must reveal evidence helpful to the defense. *United States* v. *Wright,* 160 U. S. App. D.C. 57, 489 F. 2d 1181, 1192 (D.C. Cir. 1973); *Brady* v. *Maryland,* 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The NLRB should permit adverse parties the same rights it exercises. *NLRB* v. *Southern Materials Co., Inc.,* 345 F. 2d 240 (4th Cir. 1965); *Firestone Synthetic Fibers Co.* v. *NLRB,* 374 F. 2d 211 (4th Cir. 1967). Petitioner had good cause to seek the questionnaires, so the NLRB erred in sustaining General Counsel's refusal to produce the questionnaires. *NLRB* v. *Rex Disposables, Division of DHJ Industries, Inc.,* 494 F. 2d 588 (5th Cir. 1974).

General Counsel's practice of deliberately suppressing material evidence necessary to the Company,

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the identity of the employee card signers or witnesses and avoid pre-hearing harassment by an employer. In this case, such identity was voluntarily disclosed by the NLRB to the Petitioner (employer) in the hearing, destroying the reason for and waiving the NLRB's right to assert privilege.

The Board is required to conduct its proceedings "so far as practicable" in accordance with the Federal Rules of Civil Procedure. *NLRB* v. *Jacob E. Decker and Sons,* 569 F. 2d 357 (5th Cir. 1978); 29 U.S.C. § 160(b); 29 C.F.R. § 102.39. No governmental interest in protecting its witnesses could be infringed or prejudiced, for the identity of the persons who signed the cards became known as the cards themselves were introduced in the hearing. In the instant case, then "[t]he limited disclosure sought could not prejudice any legitimate governmental interest, and [the Petitioner's] need was great." *Harvey Aluminum, Inc.* v. *NLRB,* 335 F. 2d 755 (9th Cir. 1964).

absent a legitimate governmental need requiring protection, violates due process. *Harvey Aluminum* v. *NLRB, supra; Moore* v. *Illinois,* 408 U. S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972). The Regulation allegedly justifying withholding the questionnaires should be held invalid as applied herein and the failure of General Counsel to allow disclosure under that Regulation should be found an abuse of discretion. *NLRB* v. *Safeway Scaffolds, Inc.,* 383 F. 2d 273 (5th Cir. 1967).

As the Eighth Circuit in *NLRB* v. *Selwyn Shoe Mfg. Corp.,* 428 F. 2d 217 (8th Cir. 1970), case very similar to the instant one, said:

> The General Counsel has responsibilities beyond that of a mere adversary. As a public official he has a duty and obligation to be fair to all parties and not to knowingly suppress relevant evidence. *Selwyn,* 428 F. 2d at 225.

B. The NLRB by Enforcing Its Own Subpoena and Quashing Petitioner's Subpoenas of Equally Relevant Materials Violated Petitioner's Right to Due Process and Equal Protection.

General Counsel procured judicial enforcement of a voluminous subpoena duces tecum against Petitioner and searched through practically all of Petitioner's employee-relations records covering a four year period. He then constructed a theory of disparate treatment, based on the "comparable" employment records thus obtained. The ALJ relied on that evidence as the basis of his finding that employee Bolding was fired for union activities because some employees who had been discharged for similar offenses had been given more of

a hearing. At the same time the ALJ declined to require General Counsel to produce the questionnaires. Refusal to allow Petitioner access to relevant and admissible evidence in the possession of General Counsel and the union, while enforcing General Counsel's voluminous subpoena and relying upon inferences constructed from that evidence, made the hearing below manifestly unfair, in violation of Due Process, and deprived Petitioner of Equal Protection.[10]

Moreover, Due Process mandates compliance with applicable legislation. The *Administrative Procedure Act* requires, *inter alia,* that "[e]xcept as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons." 5 U.S.C. § 559. The legislative intent which underlay this statute was "to grant to parties appearing in administrative proceedings the 'same access' to subpoena as that available to the agency staff involved." *Indiana & Michigan Electric Co.* v. *Federal*

[10]Under the due process clause, the quasi-judicial order of an administrative agency is void if the hearing upon which the order was based was "inadequate or manifestly unfair." *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.,* 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913). The "rudimentary requirements of fair play" protect the citizen called before an administrative proceeding. *Morgan* v. *United States,* 304 U. S. 1, 15, 58 S. Ct. 1001, 82 L. Ed. 1482 (1938) and the Board's procedures are constrained by the due process clause. *International Tel. & Tel. Corp.* v. *Local 134, International Brotherhood of Electrical Workers, AFL-CIO,* 419 U. S. 428, 95 S. Ct. 600, 42 L. Ed. 2d 558 (1975). Due process is a standard which calls for such protections as the circumstances require. *Morrissey* v. *Brewer,* 408 U. S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). *Mathews* v. *Eldridge,* 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Power Commission, 224 F. Supp. 166, 168 (N.D. Ind. 1963), citing S. Rep. No. 752, 79th Cong., 1st Sess. 29 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 74 (1946). The NLRB in the instant case has frustrated the purpose and intent of the *Administrative Procedure Act* by refusing to allow equal subpoena rights.

In a closely analogous case which found a state "notice of alibi" statute to be in conflict with the Due Process clause of the Fourteenth Amendment because the statute did not provide for reciprocal discovery rights, the Supreme Court declared:

> It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State. *Wardius* v. *Oregon,* 412 U. S. 470, 476, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973).

Lack of reciprocal rights in the case at bar rendered this proceeding "fundamentally unfair". It denied Petitioner its constitutional and statutory right to equal application of "requirements or privileges relating to evidence or procedure." 5 U.S.C. § 559.

If improperly elicited information supporting a finding upon which a bargaining order is based is stricken from the record, the bargaining order should fall.

C. The NLRB Violated *Gissel* and Judicial Interpretations of *Gissel* by Numerous Circuit Courts of Appeal.

This Case is specially ripe for review because it directly involves most issues arising under this Court's holding in *Gissel* which have now become a significant source of contention between the Courts and the NLRB, and among the U.S. Courts of Appeal.[11] The perfunctory decision of the D.C. Circuit below enforcing the Order of the NLRB without opinion is not in harmony with *Gissel,* the decisions of the Courts in other Circuits, and even with decisions in the D.C. Circuit *(Pedro's, supra).*

1. THE *GISSEL* RULE.

In *Gissel,* this Court stated ". . . the election process remains the preferred and most satisfactory method of ascertaining whether a union has majority

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[11]The disparity between Circuits is such that the Union in this case "forum shopped" and fixed the forum in the D.C. Circuit by filing its Petition for Review there before the Petitioner filed its Petition for Review in the Fourth Circuit where this case properly belonged because of its location and the prior proceedings in the Fourth Circuit. See, *e.g., Liquor Salesmen's Union Local 2* v. *NLRB,* __ F. 2d __, 106 LRRM 2953 (D.C. Cir. 1981). The Petitioner's Petition for Review in the Fourth Circuit was transferred to the D.C. Circuit on motion of the NLRB, *sub. nom., Gordonsville Industries, Inc.* v. *NLRB,* Case No. 80-2576 (4th Cir. December 18, 1980). By setting the proceeding in the D.C. Forum, the Union and the NLRB avoided the Fourth Circuit's holding in *NLRB* v. *Appletree Chevrolet, Inc.,* 608 F. 2d 988 (4th Cir. 1979) (which denied enforcement of an order of the NLRB in circumstances strikingly similar to those in this case and has subsequently denied enforcement a second time in the same case. March 3, 1982, __ F. 2d __, 93 LC ¶ 13287).

support", 395 U. S. at 602-603. However, the Board may issue bargaining orders in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices, *id.* at 613, and in "less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election process. "Minor or less extensive unfair labor practices . . . will not support a bargaining order." *Id.* at 614-5.

Gissel requires the Board to examine ". . . the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies." *Id.* at 614.

Gissel mandates (a) that the Board determine if unfair labor practices have been committed; then, that it having found the misconduct, (b) that it consider the possibility of having a fair rerun election. The NLRB continues to ignore the second focus, despite repeated direction from the Courts. See, *e.g., Appletree Chevrolet, supra; J. J. Newberry Co.* v. *NLRB,* 645 F. 2d 148, 154 (2d Cir. 1981).

2. THE EXTENT OF CONFUSION GENERATED BY THE MANNER IN WHICH THE NLRB HAS APPLIED *GISSEL.*

The NLRB routinely issues bargaining orders as an automatic remedy for unfair labor practices.[12]

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[12]In the past few years, in the overwhelming majority of cases in which bargaining orders were requested by the General Counsel the Board granted them. Only in a small minority was an election ordered. *NLRB* v. *Chester Valley,* 484 F. 2d 1108, 1118 (7th Cir. 1973).

Patsy Bee, Inc. v. *NLRB*, 654 F. 2d 515 (8th Cir. 1981). Even the D.C. Circuit, which normally defers to NLRB remedy determinations, has taken issue with the Board's mechanistic issuance of bargaining orders. *Peoples Gas System, Inc.* v. *NLRB*, 629 F. 2d 35 (D.C. Cir. 1980). The Courts have directed the Board to make "specific findings" upon which it bases a bargaining order,[13] but the Board continues to issue bargaining orders without any analysis "assessing the possibility of holding a fair election in terms of any continuing effect of misconduct", or other factors the Courts have considered relevant. *Peerless of America, Inc.* v. *NLRB*, 484 F. 2d 1108, 1118 (7th Cir. 1973). As a result, Courts in all Circuits but the 10th have vacated NLRB bargaining orders.[14]

The Board still demonstrates no willingness to heed a direction of the Courts that it articulate factors justifying a bargaining order, *e.g.*, *NLRB* v. *Ely's Foods, Inc.*, 655 F. 2d 290 (8th Cir. 1981); *NLRB* v. *Jamaica*

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[13]*NLRB* v. *Pilgrim Foods, Inc.*, 591 F. 2d 110 (1st Cir. 1979). *NLRB* v. *Permanent Label Corporation*, 657 F. 2d 512 (3d Cir. 1981) (en banc). *Red Oaks Nursing Home, Inc.* v. *NLRB*, 633 F. 2d 503 (7th Cir. 1980). Some Judges have caustically criticized the Board for its contumacious disregard of the Court's direction. *Walgreen Co.* v. *NLRB*, 509 F. 2d 1014, 1021 (7th Cir. 1975) (Pell, J. dissenting).

[14]See *e.g.*, cases during the calendar year 1979 to 1981. *NLRB* v. *Amber Delivery Service, Inc.*, 657 F. 2d 57 (1st Cir. 1981); *Chester Valley, Inc., supra; NLRB* v. *K & K Gourmet Meats, Inc.*, 640 F. 2d 460 (3d Cir. 1981); *Appletree Chevrolet, supra; TRW, Inc.* v. *NLRB*, 653 F. 2d 307 (5th Cir. 1981); *NLRB* v. *Arrow Molded Plastics, Inc.*, 653 F. 2d 280 (6th Cir. 1981); *Red Oaks*

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Towing, Inc., 632 F. 2d 208 (2d Cir. 1980).[15] *See also: Kenworth Trucks of Philadelphia, Inc.* v. *NLRB*, 580 F. 2d 53, 61 (3d Cir. 1978).

The Third Circuit in its continuing battle with the NLRB has had three *en banc* sittings in bargaining order cases.[16]

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Nursing Home, Inc., supra; Patsy Bee, Inc., supra; NLRB v. *Peninsula Ass'n for Retarded Children & Adults*, 627 F. 2d 202 (9th Cir. 1980); *People's Gas System, supra.* Appeals Courts have cited *Gissel* in 437 cases through January, 1982. During that period, *Gissel* was either explained (23 cases), distinguished (18 cases) or harmonized (4 cases) in forty-five cases. It was cited in nineteen dissenting opinions. *Shepherd's U. S. Citations.* The phenomenon is not a passing one. *Shepherd's Advance Sheet*, January, 1982 records that in the period it covers, *Gissel* was cited in sixteen cases and either explained (3 cases) or distinguished (2 cases) in five of them. (It is noteworthy that the National Labor Relations Board conducts the most extensive litigation in the United States Court of Appeals of any Federal Agency. In fiscal 1980 there were 449 NLRB related Appeals Courts decisions. In thirty-five per cent of them (158 cases) the Appeals Courts modified, remanded, or set aside the NLRB decision. *45th Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 1980*, Table 19, page 289).

[15]Is the NLRB to follow the law of the Circuit as developed by the Circuit? *See, NLRB* v. *Gibson Prod. Co.*, 494 F. 2d 762, 766 (5th Cir. 1974). Only a decision by this Court will settle the issue.

[16]*NLRB* v. *Armcor Industries, Inc.*, No. 77-1495 (November 15, 1978) (*en banc*) (Armcor II) (unreported *per curiam*); *Hedstrom Co.* v. *NLRB*, 629 F. 2d 305 (3rd Cir. 1980) (*en banc*) (Hedstrom II) cert. denied 450 U. S. 966, 101 S. Ct. 1699, 69 L. Ed. 2d 196 (1981); *Permanent Label Corporation, supra* (*en banc*). Dissension has surfaced among judges within the Circuit, spiced by accusation. *Id.* at 522 (Aldisert concurring) *Id.* at 528 (Garth con-

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3. SPECIFIC ISSUES IMPROPERLY DEALT WITH BY THE NLRB IN THIS CASE.

(a) Reliability of Authorization Cards.

Even NLRB members recognize that authorization cards "are hardly certain or absolute proof of what employee sentiment was or . . . what it would have been had there been no unfair labor practices." *United Dairy Farmers Coop Assn.*, 242 NLRB 1026, 1034 (1979).

Cards consistently overpredict election results.[17]

The circumstances in which cards in this case[18] were obtained demonstrate why they are an unreliable indicator of employee union sentiment.[19]

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curring in part and dissenting in part); *K&K Gourmet Meats, Inc., supra* (Gibbons, J., dissenting).

[17]Marcus Hart Sandver, *The Validity of Union Authorization Cards as a Predictor of Success in NLRB Certification Elections*, Labor Law Journal, November, 1977, page 696.

[18]The legend on the card is set forth at App. 117, n. 61, App. D. The signer of the authorization card merely accepts membership in the union and designates the union as bargaining representative. The card says nothing about the union requesting recognition without an election. It would be simple for the card to describe its purpose, *e.g.*, "This card may be used as the basis for demanding recognition without an election." Much uncertainty would be avoided if such a legend were appended. *See e.g., Red Oaks Nursing Home, supra*, at 507 (7th Cir. 1980).

[19]On some cards, dates were entered by other persons (App. 123). On more than twenty cards no date appeared (App. 124). Many cards were authenticated at the hearing by witnesses other than the signatories (App. 124). A number of cards warranted

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specific discussion by the ALJ. For example, he found that the card submitted for Della Carter specified the wrong workplace and was "filled with erasures, including an obvious erasure on the signature line, none of which Carter could explain." He rejected the card (App. 125). The Board counted it. App. C.

Michael Mitchell testified he gave eight cards to employes who left, returned shortly and handed him their signed cards. Later testimony proved his testimony was untrue. In fact, Mitchell himself signed his uncle's card, and the circumstances regarding two of the cards (the Snows) were bizarre. Mrs. Snow is illiterate. She testified that another employee (Morris) read the card to her and told her it was for "money and better benefits." Mr. Snow never saw the card. He told his wife in a telephone conversation to tell Morris to sign his name. Morris signed the Snows' names and gave the cards to Mitchell (who testified that the Snows returned them to him). The ALJ counted the cards (App. 126).

At least one card (Shirley Berry) was rejected as an obvious forgery (App. 127). Two cards were counted despite testimony that the signatories were told they were for an election (App. 128). One card was ". . . rejected for reasons that nearly beggar description . . ." (App. 125, f.n. 66). Gregory Cooper "lied" about the circumstances in which he signed a card, but based upon an affidavit submitted for another purpose, the ALJ counted it (App. 129). General Counsel withdrew one card because the signatory's name was mispelled (App. 130, n. 69).

An employee authenticated a card but the writing was so dissimilar that it was not counted (App. 132-133). Still another card (Eppert's) was different in signature, style, numerals and address. One employee (Lettner) testified that he did not read the card before he signed it and that the person to whom he returned it said the purpose was to have an election. Since the statement was not attributed to the person who gave him the card, the ALJ counted it. (App. 138). Employee Cox testified that she told another employee to sign for her after being told it was for more money and better benefits. The card was counted. (App. 138).

At least ten employees testified that when they signed the card they could not, or did not read it. All but two were counted by the ALJ. (App. 136-142). The Board reversed the ALJ and counted one of them (James Lam). App. C.

The ALJ found that the Union caused "some confusion"[20] and "potential deception" concerning the purpose of the cards. "[T]he Union . . . was unwittingly responsible for a good deal of unnecessary litigation and potential deception by originally referring to the possibility of an election . . . (, this) . . . caused some confusion in his core group, which became amplified further down the line". (ALJ 69).

The only justification in the decision below for a conclusion that the cards were superior as an indicator of employee opinion to the actual election results or would be to the results of a future election was tentatively stated by the ALJ as follows:

> It seems probable that an unarticulated factor in such decisions is an appreciation of the *solemnity* which would likely attend the signing by an average employee of a card which makes him as this one does, a "member" of a union. (ALJ 78). (Emphasis added).

An equally probable "unarticulated factor" might have been that when ones friend requests a signature

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[20]The manifestation of the confusion is reflected in the testimony of two Board witnesses. James McDaniel, who solicited cards for the Union "held out a firm commitment of an election as the end result of signing a card." (App. 141). Another solicitor (Collins) referred ". . . only to an election objective in making subsequent solicitations." (App. 139). Collins solicited the signature of one employee who could read "a little bit" (David Lam), and another employee "who cannot read or write." (Rollins). Both cards were counted. William Figgins authenticated 23 cards at the hearing (App. 130). Five employees testified Figgins told them the card was to get an election. All cards were counted. (App. 131-132).

on a card, one is tempted to comply with the friend's request, absent compelling reasons to the contrary. Should the NLRB be permitted to prevail in this war of supposition?

(b) NLRB Failure to Consider the Nature of Unfair Labor Practices.

Petitioner's violative conduct alleged to have occurred *before* the election below consisted of:

1. distribution of a standard questionnaire to employees as the first phase of a confidential employee survey by an independent consulting firm, at a time prior to receipt of the Union's demand for recognition;[21]

2. handing each employee a truthful and precise memo of Petitioner's actual cash contribution a year earlier for that employee's benefit to a Profit Sharing Plan, App. O, in correction of false and misleading provocative pamphlets (the "graveyard bulletin"), App. N, circulated to all employees two days before the election by the Union.[22]

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[21]A holding contrary to the NLRB's own ruling that, for the purposes of considering whether or not to set an election aside, actions of the parties prior to the filing of an election petition are not to be considered. *NLRB* v. *Blades Mfg. Corp.*, 344 F. 2d 998 (8th Cir. 1965).

[22]A holding violative of Petitioner's Free Speech rights and contrary to the D.C. Circuit's own holding in the case of *Pedro's, Inc.* v. *NLRB*, 652 F. 2d 1005 (D.C. Cir. 1981).

3. discharging an employee who physically assaulted another employee;[23] and

4. making miscellaneous, isolated, allegedly improper statements to approximately seven employees (some of whom were personal friends with the offending low level supervisors) on seven occasions during the two-and-one-half months campaign (and a statement to one individual by a Company officer).[24]

Petitioner's conduct *after* the election (which in no way could have impacted the election) consisting of:

1. granting a wage increase three weeks after the election effective January 1, 1978, at the time equal amount increases were mandated by Federal Wage and Hour legislation effective January 1, 1978;

2. granting a general cost of living wage increase on July, 1978, the historic annual anniversary date of prior wage increases;[25] and

3. a letter to employees in June, 1980, advising them of the pending hearing date in this matter and

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[23]A holding the ALJ justified only by reliance on evidence of Petitioner's "past disciplinary practices" obtained by the NLRB in a manner violative of Petitioner's Equal Protection and Due Process rights. (See Supra Section B)

[24]Offenses having little or no impact within the 330 person unit at Gordonsville.

[25]This increase and the one referred to in item 1 next above were given during periods when post-election proceedings promised that a rerun election, if any, could not be held for many months.

requesting that they testify truthfully[26] and responsibly. App. P.

The ALJ and the NLRB held by virtue of the foregoing, the Company engaged in violations of the Act of such magnitude that they could only be remedied by a bargaining order.

Although the unfair labor practices found in this case are categorized in ponderous terms, in point of fact each practice, even if a violation, was only marginally or technically so based upon inference and speculation. Each charge was vigorously disputed by Petitioner, and business justification for all the acts is in the record. Other Courts have viewed the same acts as lawful, generating a serious divergence among the circuits.[27]

The propensity of the alleged acts of Petitioner to contaminate the election environment requires more than the superficial analyses they received here, especially since the alleged acts were only marginally or

[26]This letter and the letter to employees advising them of their profit sharing plan participations are truthful and noncoercive. The Board's holding that they are unfair labor practices violates the First Amendment Protection of Free Speech, Section 8(c) of the Act, and under *Gissel* cannot constitute the basis of a bargaining order.

[27]A pre-election survey of employee attitude is not a violation, *Appletree Chevrolet, supra;* a wage increase in anticipation of an increase in the minimum wage, *J. J. Newberry Co., supra;* a wage increase on the anniversary date for granting increases, *Chester Valley, supra;* announcement of a predetermined profit sharing plan, *Simpson Electric Co.* v. *NLRB*, 654 F. 2d 15 (7th Cir. 1981). Even the D.C. Circuit is in accord with the latter. See *Pedro's, supra.*

technically violative. The Board did not consider it important that the Petitioner committed technical rather than contumacious violations.

(c) NLRB Failure to Consider Passage of Time.

On June 29, 1978, more than six months *after* the election and at a time when protracted NLRB proceedings were pending (unfair labor practices, objections to the conduct of the election, challenges to the ballots cast by eighteen employees), Petitioner gave a general wage increase to its employees at the anniversary date on which it traditionally granted such increases. The ALJ's decision that the wage increase was an unfair labor practice was issued *more than sixteen months later* (November 8, 1979). The NLRB Order affirming the findings and conclusions of the ALJ was dated September 30, 1980, thirty months after the last act of alleged misconduct. (Were employees to be denied a wage increase for that entire period?) Three years had elapsed since any other acts of alleged misconduct.

A number of Courts require the NLRB to consider what bearing the passage of time has upon employee choice, *Jamaica Towing, Inc., supra, Pedro's, supra;* especially where, as in this case, the time lapse is not caused by the employer.[28]

Here the NLRB did not even comment upon the passage of time as a factor in the formulation of its remedy.

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[28]The ALJ expressly found ". . . the union . . . was unwittingly responsible for a good deal of unnecessary litigation." (ALJ 69).

Although it is the rule in the D.C. Circuit that the Board should formulate its remedy in light of the conditions in the bargaining unit at the time it renders its decision, *Pedro's, supra; People's Gas System,*[29] *supra;* the Court did not apply its rule in this case.

CONCLUSION

The NLRB should be compelled to conduct hearings which comport with constitutional and statutory requirements. Agency hearings should be conducted in a manner whereby unfairly obtained evidence is stricken and production of relevant documents required. The NLRB did not allow Petitioner to test the proof of an alleged majority and verify authenticity of cards the NLRB erroneously relied upon.

The recurring conflict of opinion about *Gissel's* scope and the Board's role thereunder has generated much appellate litigation and created abject confusion about the state of the law in bargaining order cases. Not only do the circuits disagree, but panels within circuits disagree as well. Meanwhile, the Board ignores direction from the Courts, and continues to award bargaining orders pursuant to its view of the law. The NLRB and the labor bar need a definitive resolution of

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[29] "The question of whether the passage of so much time and intervening events are factors which should be taken into account by the Board in formulating a remedy is in much dispute among the Courts, commentators and the Board itself." *People's Gas System,* 629 F. 2d at 47 (D.C. 1980). See also *"After All, Tomorrow is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?,* 31 Stan. L. Rev. 505 (Feb. 1979).

the issues. This case, because it involves most facets of *Gissel,* presents an apt opportunity for the Court to provide the appropriate direction.

Failure to grant review will allow the NLRB to continue its practice of disenfranchising employees in bargaining order cases, and will have the immediate effect of disenfranchising a majority of Petitioner's employees.

Respectfully submitted,

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Springfield, New Jersey 07081

Appendix

81-1844

No.

Supreme Court, U.S.
FILED
APR 2 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

GORDONSVILLE INDUSTRIES, INC., - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, - - - - - Respondents

---

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

JOHN S. GREENEBAUM
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April 5, 1982

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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APPENDIX A

NOT TO BE PUBLISHED—SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION (AFL-CIO), - - - - *Petitioner*

v. **No. 80-2203**

NATIONAL LABOR RELATIONS BOARD, - - *Respondent*
GORDONSVILLE INDUSTRIES, INC., - - - *Intervenor*

NATIONAL LABOR RELATIONS BOARD, - - *Petitioner*

v. **No. 80-2392**

GORDONSVILLE INDUSTRIES, INC., - - - *Respondent*

GORDONSVILLE INDUSTRIES, INC., - - - *Petitioner*

v. **No. 80-2576**

NATIONAL LABOR RELATIONS BOARD, - - *Respondent*

Petitions for Review and Application for Enforcement of an Order of the National Labor Relations Board

Before: TAMM and ROBB, Circuit Judges and MCGOWAN, Senior Circuit Judge

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ORDER—Filed January 19, 1982

These causes came on to be heard on the petition for review and the application for enforcement of an order of the National Labor Relations Board and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the order of the National Labor Relations Board under review herein is hereby affirmed and the Board's application for enforcement thereof is granted. This Court's formal judgment will be settled as provided in Rule 19, F.R.A.P.

Per Curiam
For the Court

(s) George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2203

September Term, 1981

Argued 1-7-82

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION (AFL-CIO), - - - - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent*
GORDONSVILLE INDUSTRIES, INC., - - - *Intervenor*

And Consolidated Case Nos. 80-2392 and 80-2576
Before: TAMM and ROBB, Circuit Judges and McGOWAN, Senior Circuit Judge

ORDER—Filed February 12, 1982

On consideration of the petition for rehearing of petitioner Gordonsville Industries, Inc., filed February 4, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:
George A. Fisher, Clerk

By: (s) Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

GORDONSVILLE INDUSTRIES, INC. and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC	Cases 5-CA-9050, 5-CA-9308, and 5-RC-10242

DECISION AND ORDER

On November 8, 1979, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs, and Respondent filed reply briefs to the General Counsel and the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of

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[1]Respondent has filed a number of procedural and evidentiary exceptions to the rulings of the Administrative Law Judge made during the hearing, particularly to the quashing of its subpoena

(Footnote continued on following page)

the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.

1. The General Counsel and the Charging Party have excepted to the Administrative Law Judge's dismissal of the allegation that Respondent violated Section 8(a)(1) of

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(Footnote continued from preceding page)

served on counsel for the General Counsel. The record shows that on July 28, 1978, Respondent served its subpoena during the initial course of the hearing, whereupon the Administrative Law Judge quashed the subpoena substantially in its entirety. Respondent sought to obtain statements, affidavits, and other documents from the General Counsel's investigatory files. On September 5, 1978, Respondent filed a motion for enforcement of its subpoena with the General Counsel in Washington, D. C., which was denied on September 20, 1978. On August 2, 1978, Respondent also filed a motion, in accordance with Sec. 102.118 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, requesting that counsel for the General Counsel be allowed to voluntarily turn over to Respondent certain items. The General Counsel denied this request on August 10, 1978. Respondent's exceptions contain the same arguments made before the Administrative Law Judge and the General Counsel. We find no merit to these exceptions. *N.L.R.B.* v. *Vapro Blast Manufacturing Company*, 287 F. 2d 402, 405-408 (7th Cir. 1961); *Woodlawn Hospital* v. *N.L.R.B.*, 596 F. 2d 1330 (7th Cir. 1979).

[2]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 118 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3]The Charging Party has excepted to certain aspects of the remedy and Order recommended by the Administrative Law Judge, and seeks certain remedies in addition to those that we have adopted. We are in agreement with the Administrative Law Judge

(Footnote continued on following page)

the Act by conducting a survey of its employees that constituted coercive interrogation because it generated responses from employees regarding their union sentiments. In support of this allegation, the General Counsel and the Charging Party relied upon the fact that the survey contained several open-ended questions which a substantial number of employees responded to with answers that indicated their union proclivities. Further, the survey required the employees to fill in their department, shift, sex, and length of service. The Administrative Law Judge found that this evidence furnished no basis for concluding that Respondent engaged in unlawful interrogation because the survey did not explore employee attitudes about unionization, and employees were told that the forms would be destroyed after scoring. We find merit to the General Counsel's and the Charging Party's exceptions.

In conducting the survey, Respondent informed its employees that the survey was confidential. However, requiring employees to write in their department, age, sex, and length of time employed destroyed whatever anonymity existed, and clearly gave information which could serve to

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(Footnote continued from preceding page)

that Respondent has committed serious unfair labor practices; however, as Respondent does not have a history of violations of employee rights, we shall not grant any additional remedies. Nevertheless, in view of the serious unfair labor practices committed by Respondent, the Administrative Law Judge, in his recommended Order, included a broad order provision as remedy. In our opinion, the egregious misconduct engaged in herein by Respondent clearly "demonstrate[s] a general disregard for [its] employees' fundamental statutory rights." *Hickmott Foods, Inc.*, 242 NLRB No. 177, sl. op. at p. 2 (1979). Accordingly, we find, in agreement with the Administrative Law Judge, that a broad order is warranted in this case.

identify employees.[4] The mere stating that a survey is confidential does not meet the Board's standards for the valid, nondiscriminatory surveying of employees either during a union organizing campaign and/or after a demand for recognition has been made.[5] While it is true that the survey did not specifically contain a question directly polling employees' union sentiments, it is obvious in this case that the question, "[W]hat would you like to see done to make your company a better place to work?" had that effect, as a number of employees responded with answers that revealed their union sentiments. This is no less inpermissible than if the question had been asked directly, especially since it occurred within the context of other violations of Section 8(a)(1).[6] In addition, Respondent's survey consultant testified that he was informed rather abruptly by some of the employees in the various survey sessions that there was a union organizing campaign being conducted, and they questioned his presence and indicated that they did not believe his assurances regarding confidentiality and the ultimate destruction of the survey. Thus, there is sufficient reason to think the employees held contrary beliefs. This indicates that, given the circumstances of this case, and contrary to the Administrative Law Judge, the necessary confidentiality and assurances against reprisals were lacking during the administration of the survey, and that the responses generated by some of the subjective open-ended questions had the effect of infringing upon the employees' Section 7 rights. Therefore, we conclude that the survey constituted an unlawful interrogation of employees in violation of Section 8(a)(1) of the Act.

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[4] *Wonder Markets, Inc.*, 246 NLRB No. 56 (1979).

[5] *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967).

[6] *Dunn Brothers, Incorporated, t/a Fisher Stove Works*, 235 NLRB 1032, 1042 (1978).

2. The Charging Party excepted to the Administrative Law Judge's dismissal of the allegation that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance during an October 22, 1977, conversation between Respondent's supervisor, Fernandez, and employee Baugher. Baugher testified that during this conversation he was asked "if [he] knew how many people in that department were for the Union," to which he (Baugher) replied "no." We are in agreement with the Administrative Law Judge that this did not constitute surveillance. However, we do find that this questioning of Baugher constituted illegal interrogation regarding employees' union activity and therefore was violative of Section 8(a)(1) of the Act.[7]

3. The Administrative Law Judge found that the Union had not been designated as bargaining representative by a majority of Respondent's employees on September 26, 1977, the date that the Union made its bargaining demand and also the date when Respondent embarked on its unlawful conduct, but that the Union had a continuing majority beginning on September 27, 1977. He based this finding on his determination that of the 215 authorization cards secured by the Union, 50 of them should not be counted and 14 out of the 50 were invalid designations, including the cards of Carter, Marks, and Lam. Therefore, out of a stipu-

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[7]Although the complaint alleged that Fernandez' conduct violated the Act by creating the impression of surveillance, we are not precluded from finding a violation under an alternate theory. It is well established that, where, as here, the facts underlying the violation are fully developed at the hearing, an unfair labor practice finding can be based on the issues litigated as well as those specifically alleged in the complaint. *C & E Stores, Inc. C & E Supervalue Division*, 221 NLRB 1321 (1976); *Phillips Industries, Incorporated*, 172 NLRB 2119 fn. 2 (1968); *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

lated unit of 333 eligible employees in the bargaining unit existing on September 26, the Union had secured only 165 valid cards and it needed 167. Contrary to the Administrative Law Judge, and in agreement with the Charging Party, we find, for the reasons set forth below, that the cards signed by Carter, Marks, and Lam are valid designations, and we shall count their cards in determining the Union's majority status.

Della Carter testified that she signed her card on September 22, 1977, and that she did not read the card, but she knew what the card was for. On recross-examination Respondent's counsel brought up the fact that Carter's card stated she worked in "Mill A" when in fact she worked in "Mill E." Carter's explanation was simply that she made a mistake as she was talking as she signed the card. She also testified that she works the A shift, and that there were no other mistakes on her card even though Respondent's counsel pointed out there were what appeared to be erasures on the card. Upon examination by Administrative Law Judge Ries, Carter verified that the signature on the card was hers, and that she started working in Mill E in May 1977. On redirect examination Carter recalled that she had worked in Mill A during the July plant shutdown. The Administrative Law Judge, while crediting Carter with being an honest witness, nevertheless concluded that her card was invalid because she wrote Mill A instead of Mill E on her card, and she could not account for the erasures. Carter's card was entirely filled out in her own handwriting, and she verified that the signature and date were hers. It is our opinion, absent some contradictory evidence that her card bore a forged signature or that there was a misrepresentation made as to the purpose of the card,[8] the fact that

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[8] *Keystone Pretzel Bakery, Inc.*, 242 NLRB No. 77, sl. op., p. 7 (1979).

she could not explain why she wrote in Mill A instead of Mill E and the erasures are not of such significance as to invalidate her card.[9] Therefore her card will be counted toward the Union's majority.

The Administrative Law Judge found Nancy Marks' card invalid because she gave "some very convoluted testimony as to when she signed it and the Regional date stamp on the back was that of May 1978." Marks testified that she read the card; that the signature on the card was hers; and, in response to the Administrative Law Judge's questioning, that she wrote in the date of September 26, 1977.

She also identified her brother-in-law as the person who gave her the card, but she could not remember to whom she returned the card. On *voir dire,* after some initial confusion, it was finally determined that Marks did not have a copy of her card at the time she filled out the General Counsel's card questionnaire,[10] and therefore the answers she gave on the questionnaire were a result of her inability to remember specifics as to the date she signed the card and who gave the card to her. A review of Marks' testimony convinces us that her testimony, even though characterized as convoluted by the Administrative Law Judge, should not impugn the authenticity of her card as there was no showing by Respondent that the signature of Marks was induced by misrepresentation or coercion or other fraudulent methods.[11] Further, the evidence shows that the Union submitted its first batch of cards to the Regional Office on September 29, 1977, and its second batch of cards were received

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[9] *McEwen Manufacturing Company and Washington Industries, Inc.,* 172 NLRB 990, 992 (1968).

[10] An unsworn questionnaire executed many months after the initial card signing.

[11] *N.L.R.B.* v. *Gissel Packing Co., Inc.,* 395 U. S. 575, 584 (1969); *Jeffrey Manufacturing Division, Dresser Industries, Inc.,* 248 NLRB No. 7 (1980).

in the Regional Office on May 17, 1978. Marks' card was included in the second batch. The record does not affirmatively establish the exact time that any card come into the possession of the union representatives, nor is it affirmatively shown that any card was not received by a union representative on the date which appears thereon.

Further, our scrutiny of Marks' card convinces us that all of the entries were made by her. Therefore, we conclude that her card was timely as it satisfies all of the other necessary criteria, and we shall count it toward the Union's majority.[12]

James Lam testified that he was aware of the Union's organizing drive and the distribution of the Union's blue cards. He stated that he was working on a machine when Ernest Williams came up to him and asked him "would be sign a union card, a little blue card, to let the union come for a vote, so they could have an election." Lam readily agreed and signed the card. Lam also testified that "he did not read the whole card because he was working and Williams said he had to hurry up because the foreman was coming, that it may have got him [Williams] in hot water." Further, Lam stated that he had previously belonged to the Carpenters local and had signed and carried a membership card which was punched each month when he paid his dues.

In finding this card invalid, the Administrative Law Judge held in effect that because Lam disavowed having read the card and no other purpose was communicated to him other than "to let the union come for a vote" the solic-

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[12]This is consistent with the Administrative Law Judge's timeliness finding regarding employee Dickerson's card. *Cato Show Printing Co., Inc.*, 219 NLRB 739, 756 (1975) (Combes and Cory); *J. P. Stevens & Co., Inc., Gulistan Division*, 179 NLRB 254, 271 (1969) (Floyd and Lowery); *Fabricators, Incorporated*, 168 NLRB 140 (1967).

itation constituted a representation that the only purpose of the card was to get an election. We disagree.

The evidence is clear that Lam read parts of his card as he filled it out. Thus, the solicitor's comments could not have diminished Lam's belief that he was authorizing the Union to represent him. Lam has extensive prior knowledge and experience as a member of the Carpenters Union. Therefore, the totality of the circumstances convinces us that Lam's card constituted a valid designation.[13] Accordingly, we shall count Lam's card toward the Union's majority.

In view of our findings above, we conclude that the Union represented a majority of Respondent's employees on September 26, 1977, and thereafter.[14] We will therefore find that Respondent violated Section 8(a)(5) by refusing to recognize the Union on and after September 26, 1977.[15]

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[13]*Gissel Packing Co., Inc., supra; Levi Strauss & Co.*, 172 NLRB 732 (1968); *Medley Distilling Company, Inc.*, 187 NLRB 84, 85, fn. 8 (1970).

Our finding here is consistent with the Administrative Law Judge's crediting of employee Cromer's prior knowledge and experience as a union member, and does not represent any extension of *Cumberland Shoe Corporation*, 144 NLRB 1268 (1963), enfd. 351 F. 2d 917 (6th Cir. 1965). See also *Tipton Electric Company and Professional Furniture Compauy*, 242 NLRB No. 36 (1979), enfd. 104 LRRM 2073, 88 LC ¶12005 (8th Cir. 1980).

[14]As of that date, the Union had obtained 168 cards in a unit of 333 employees; and, as of October 3, 1977, 204 cards in a unit of 326.

[15]*Trading Port, Inc.*, 219 NLRB 298 (1975); *The Kroger Company*, 228 NLRB 149 (1977). Member Jenkins, while concurring in the result reached herein, continues to adhere to his position as stated in *Idak Convalescent Center of Fall River, Inc. d/b/a Crawford House*, 238 NLRB No. 59 (1978), and therefore would order Respondent to bargain with the Union effective September 26, 1977, the date Respondent commenced its unfair labor practices.

Amended Conclusions of Law

1. Substitute the following for Conclusion of Law 4:

"4. By, in September, October, November, and December, 1977 and June 1978, coercively interrogating employees regarding their union sympathies through means at a survey; conducting a survey and in other ways expressly and impliedly promising to rectify employee grievances and to grant benefits; coercively interrogating employees regarding their and other employees union sentiments; threatening employees with loss of benefits, loss of jobs, blacklisting, plant closure, and a refusal to bargain in the event of a union election victory; restricting and harassing employees; interfering with Board processes by attempting to influence the testimony of employees in Board proceedings; granting wage increases; and announcing the existence of a profit-sharing plan, Respondent violated Section 8(a)(1) of the Act."

2. Substitute the following for Conclusion of Law 6:

"6. By refusing, on and after September 26, 1977, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described above, Respondent violated Section 8(a)(5) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Gordonsville Industries, Inc., Gordonsville, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) Coercively interrogating employees regarding their union sympathies by means of a survey; interrogating employees regarding their and other employees' union sentiments; threatening employees for assisting or supporting the Union, or any other labor organization, with loss of benefits, loss of jobs, blacklisting, plant closure, or a refusal to bargain; promising expressly or impliedly to rectify employee grievances or to grant benefits to employees to induce them to refuse to support the Union, or any other labor organization; restricting or harassing employees; granting wage increases; announcing the existence of a profit-sharing plan; and interfering with Board processes by attempting to influence the testimony of witnesses in Board proceedings."

2. Substitute the following for paragraph 2(b):

"(b) Recognize and, upon request, bargain collectively with the Union, as the exclusive representative of the employees in the appropriate unit set forth above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D. C. September 30, 1980.

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
John A. Penello, Member

(Seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to recognize and bargain collectively in good faith, upon request, with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, as the exclusive bargaining representative of all employees in the appropriate unit set forth below, with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL NOT discharge or otherwise discriminate against employees to discourage their membership in,

or activities on behalf of, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, or any other labor organization.

WE WILL NOT coercively interrogate employees regarding their or other employees' union sentiments by means of a survey or any other method; threaten employees for assisting or supporting the Union, or any other labor organization, with loss of benefits, loss of jobs, blacklisting, plant closure, or a refusal to bargain; promise expressly or impliedly to rectify employee grievances or to grant benefits to employees to induce them to refuse to support the Union, or any other labor organization; restrict or harass employees; grant wage increases; or announce the existence of a profit-sharing plan.

WE WILL NOT interfere with Board processes by attempting to influence the testimony of witnesses in Board proceedings.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL recognize and, upon request, bargain collectively with the Union, as the exclusive bargaining representative of the employees in the appropriate unit set forth below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed statement. The appropriate unit is:

All production and maintenance employees employed by us at our Gordonsville, Virginia, location, but excluding office clerical employees, guards, pro-

fessional employees, and supervisors as defined in the Act.

WE WILL offer Stephen Bolding immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges, and WE WILL compensate him, with interest, for any loss of pay he may have suffered because we terminated him.

Gordonsville Industries, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9100 Edward A. Garmatz Federal Building, 101 W. Lombard Street, Ninth Floor, Baltimore, Maryland 21201, Telephone 301-962-2915.

APPENDIX D

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

GORDONSVILLE INDUSTRIES, INC. and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC	Cases Nos. 5-CA-9050 5-CA-9308 5-RC-10242

Joseph J. Baniszewski, Esq., and *Paul E. Stanzler, Esq.*, of Baltimore, MD, for the General Counsel.
Thomas W. Ross, Esq., and *Melinda Lawrence, Esq. (Smith, Patterson, Follins, Curtis, James & Harkavy)*, of Greensboro, NC, for the Charging Party.
John S. Greenebaum, Esq. (Greenebaum, Treitz & Maggiolo), of Louisville, KY, for the Respondent.

DECISION

BERNARD RIES, Administrative Law Judge: This proceeding was tried in Charlottesville, Virginia, on 24 days in July, August, September, October, and November 1978. At the request of the parties, briefs were not filed until April 1979.

Consolidated in this proceeding are two unfair labor practice complaints and certain unresolved questions arising out of an election held among Respondent's employees in 1977. The complaint in Case 5-CA-9308 is identical in

all respects to the complaint in Case 5-CA-9050 except that the former alleges, in addition to allegations of Section 8(a)(1) and (3) violations, a violation of Section 8(a)(5) and a request for the issuance of a remedial bargaining order. The record does not clarify why this procedure was adopted; in any event, the two complaint cases and the representation case are now consolidated for decisional purposes.

The pleadings establish that assertion of jurisdiction over the Respondent is appropriate here and that the Charging Party is a "labor organization" within the meaning of the statute. On the basis of the entire record, the briefs, and my recollection of the demeanor of the witnesses, I make the following findings of fact, conclusions of law, and recommendations.[1]

---

[1]The transcript of proceedings is hereby corrected as follows:

Page	Line	Change	To
64	11	Holley	Hawley
106	10	Hollo	Harlow
251	1	to sign that that	whether you signed that
251	3	ask you to sign	ask whether you signed
361	8	anything. All	anything. A. All
457	1	isn't	is an
898	15	My	A. My
953	24	15th	18th
996	13	Perkins	Cooper
1008	20	Cannon	Taylor
1030	5	even seen	ever saw
1225	23	Finley	Henry
1230	17	JUDGE RIES	Q.
1242	16	in	and
1329	1	(n)	(m)
1402	12	Bob	Tom
1670	6	exhibits	exits
1672	12	much	must

(Footnote continued on following page)

I. Background Events

The Union formally commenced its campaign at Respondent's fabric manufacturing factory in Gordonsville, Virginia, on September 18, 1977, when organizer Harold Bock met with 15 employees who were to become the first wave of authorization card solicitors. Card-signing proceeded quickly; virtually all of the 215 cards submitted in this case bear September dates. On September 23, the Union asked Respondent, in writing, for recognition; the request was rejected by letter of September 27. On September 29, the Union filed a petition for an election with Region 5 of the Board. The parties agreed to a Stipulation for Certification upon Consent Election, and an election was held on December 6. The tally of ballots showed that of 345 ballots cast, 144 were cast for the Union, 143 against the Union, and 58 were challenged.

(Footnote continued from preceding page)

Page	Line	Change	To
1718	13	Mill A.	Mill A knitting?
1830	1	has	is
1928	5	card	call
1967	13	aide	A
1977	19	Thomas	Tomlinson
2261	23	Ross	Greenbaum
2307	12	jive	jibe
2470	10	hers	his
2523	18	given	given a letter
2584	20	without your	with
2795	18	impression	compression
2801	20	impression	compression
2841	22	3.60	3.64
2841	24	3.60	3.64
2844	3	grade	grade five
2910	3	Q. He	He
2911	18	did not	did
3020	25	irrelevant	relevant

II. The Alleged Violations of Section 8(a)(1)

The complaint, as amended at the hearing, alleges that Respondent's agents, on various occasions in September, October, November and December 1977, and again in June 1978, committed violations of Section 8(a)(1), which broadly makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

A. The September Survey

Some 8 days after the Union campaign began, Respondent conducted a survey of the work-related opinions and attitudes of all its employees. The complaint alleges a violation of Section 8(a)(1) by "[t]he conduct of a consultant . . . in conducting a survey of employees and in soliciting employee grievances in order to persuade them not to support the Union." At the hearing, to elaborate on the thrust of the allegation, counsel for General Counsel said, "I'm suggesting both that the survey itself and the means utilized would be solicitation of grievances in violation of the Act and that it would be a means that the Company would use to learn the union sentiments of its employees in an impermissible manner in violation of 8(a)(1)."

Gary Miller, Respondent's acting plant manager at the time, testified that the survey conducted on September 26 and 27 was instigated by reports of low employee morale, and that he did not know of the existence of the Union effort until shortly after the survey began on September 26, when the Union's recognition request was received. The lack of veracity of that testimony was exposed by the evidence given by one former official of Respondent and two present managers.

Francis Gehring, until January 1978 the executive vice president of Respondent's parent corporation, Liberty Fabrics of New York, testified that while he and Michael Gottlieb, the president of Liberty, were in Europe in September 1977, he received a call from Gary Miller advising of the Union campaign. Miller was told to contact Respondent's local counsel for advice. As a result of that advice, Miller retained a Bristol, Tennessee, personnel consulting firm called "SESCO." I found Gehring to be a most credible witness, and I do not believe that his testimony was influenced by the fact that Respondent had discharged him and, later, his son. In addition, Gehring's testimony was supported by that given by production control manager Oliver McKeown, and his assistant, Raymond C. Deane, Jr., that they were quite aware of the extensive Union solicitation before the survey began.

It is, indeed, absurd to suggest that this hasty project was undertaken, pursuant to a trans-Atlantic telephone call, because of some vague concern about employee "morale." Miller's testimony that the "first day [he] learned of the union campaign" was when he received the demand letter is effectively refuted by the fact that, on that very day, the production control managers spoke to their clericals against the Union, as discussed *infra,* with McKeown and Deane telling Nancy McDaniel, as they both conceded, that "[w]e thought that we knew how she felt." McKeown testified that, prior to September 26, there "had been rumors of union activity" in which the name of Nancy McDaniel, as well as "quite a few" other employees, was mentioned.[2]

On September 26 and 27, two employees of SESCO, Tom Forshee and Gary Blankenbecler, conducted a survey

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[2]Tom Forshee, who conducted the subsequent survey, conceded that when Miller first spoke to him (according to Forshee, in the week preceding September 26), Miller mentioned being disturbed by employee talk that "a union would be beneficial."

of employee attitudes at the plant. They used a standard printed survey form which asked general questions pertaining to employee views about benefits and working conditions; all but 4 of the 64 questions were to be answered by checking "yes" or "no" boxes. Plant employees were brought into conference rooms by supervisors, in groups ranging in size from about 5 to 35. The employees were told only that the purpose of the survey was to "get opinions," were asked to be frank, and were advised that the survey was confidential.[3] There is no place on the form for an employee's name; it asks, however, that the employee identify his or her sex, department, shift, and length of service.

The survey results were computer tabulated by SESCO, with the responses of the 326 employees being divided into 28 survey groups according to work locations and, sometimes, shift. A typical breakdown might show, for example, that of 24 employees in a particular group, 12 responded favorably to the question "Do the people in your community think this is a good company in which to work," 9 responded unfavorably, and 3 did not respond. For purposes of overall evaluation, the 64 questions were also amalgamated into 12 general topics (e.g., "Immediate supervisors," "Pay," "Communication"), and the group responses determined.

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[3]The form itself states that the success of the Company depends upon the attitude of the employees, and "[t]his is the reason why your company wants to know what you think and how you feel about your 'job.' Your personal opinions and suggestions on how to make this a better and more pleasant place to work will be helpful to us in making our recommendations to your company." The form stresses that it is "confidential" and that "YOU ARE NOT ASKED TO SIGN YOUR NAME," and it notes that the forms are taken to the offices of the consulting company immediately and, after being scored, are destroyed.

On October 6, plant manager Miller sent letters to the participating employees, thanking them for filling out the surveys, stating that he wished to discuss the survey results in departmental meetings the following week, and expressing his "hope that these meetings will contribute to our common goal of making Gordonsville Industries the best possible place to work." Over a 3-4 day period the next week, Miller conducted meetings about the survey with groups of 10-15 employees. Employee Stephen Bolding testified that at one such meeting, Miller said that the Company had "flunked" the test and had not realized the extent of the problems within the plant. When an employee asked about a promised wage increase, Miller "said they were working on it" and also said that "they would work on these problems now that they were aware of them."[4]

The survey results were also used for another purpose. Gehring testified that he met with Forshee and Blankenbecler on October 4 to discuss their findings; the discussion centered on the conclusion that "particular supervisors were identified as sources of problems to be investigated." Subsequently, Gehring said, further investigation confirmed the suspicion that David May, manager of the elastic mill, "was responsible for a substantial negative rating," and he was "moved out" to the West Coast. Bill Silette, manager of the warping plant, was "perceived by SESCO to be a more people oriented person," and was appointed to May's position. Jim Spencer, superintendent of lace knitting, "got a very poor rating" and was also transferred.

The evidence shows that Respondent had never previously conducted a survey of employee attitudes toward their working conditions, nor had it established any syste-

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[4]General Counsel expressly stated at hearing that this statement was not alleged separately to violate the Act.

matic procedure for receiving and analyzing employee complaints.

The language of the Board in *Reliance Electric Company, Madison Plant Mechanical Drives Division,* 191 NLRB 44, 46, is made to order for the present case:

> Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.

Given my conviction that the survey was, in General Counsel's words, "a specific, calculated response to the employee-union organizational campaign," there can be little doubt that the purpose of this extraordinary and unprecedented action was to convey to employees that the days of benign neglect were over. "[T]he more imminent a representational election, the greater the presumption that management's expression of concern for employee welfare has an impermissible motive," *N.L.R.B.* v. *Rich's of Plymouth, Inc.,* 578 F. 2d 880, 883 (C.A. 1).

There can also be little doubt that the thought intended was the thought communicated; employees whose opinions about their employment had never been elicited suddenly found, 8 days after the union cards began to appear, that their observations were prized. Their likely belief that this was Respondent's way of promising a fresh start could only have been confirmed thereafter by Miller's October 6 letter to each of them (at a time when, Respondent is will-

ing to admit, it was fully, formally, and officially on notice of the Union campaign), expressing his hope that the quickly-scheduled department meetings about the survey results "will contribute to our common goal of making Gordonsville Industries the best possible place to work." The subsequent transfer of three supervisors in accordance with the attitudes expressed by the employees in the survey certainly added dramatic confirmation for the affected employees, and those aware of the circumstances, that the intent of the survey had indeed been not only to elicit, but to repair, grievances.[5]

I conclude that the purpose and effect of the survey was to impliedly promise employees that, in the future, Respondent intended to bend every effort to rectify their grievances, and I further conclude that the underlying motive for the survey was to erode employee support for the Union. Section 8(a)(1) prohibits such behavior.

I do not believe, however, that the survey constituted coercive "interrogation" as well. The survey form did not explore employee attitudes about unionization; it inquired only into employee evaluation of working conditions. Obviously, disclosure that an employee did not like the company scarcely demonstrated that he favored the Union. The employees were told that the forms would be destroyed after scoring, and there is no reason to think they held a contrary belief. I shall therefore recommend dismissal of the allegation insofar as the argument is advanced that the survey constituted unlawful intrusion into union sentiments.[6]

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[5]Although the timing of these personnel actions does not appear in the record, they quite probably occurred prior to January 1978, when Gehring, who testified about the transfers, severed his relationship with Respondent.

[6]*Dunn Brothers, Incorporated,* 235 NLRB No. 142, cited by General Counsel, presents different considerations. There, a psycholo-

(Footnote continued on following page)

B. Alleged Unlawful Interrogation on September 26

As amended at hearing, the complaint alleges that on September 26, supervisor Oliver McKeown violated the Act by "interrogating employees concerning union activities and implying that benefits would be withheld because of the Union activity and the solicitation of grievances."

Nancy McDaniel, a clerical employee who worked with 4 other clericals in the offices occupied by production control manager McKeown and his assistant manager, Raymond Deane, actively solicited Union cards and distributed handbills.[7] On September 26, during the employee survey discussed *supra*, McDaniel opted not to fill out the form given her and, contrary to the desire of the surveyor, took the blank form with her when she left the room.

That same afternoon, McKeown and Deane called 4 of their office clericals into McKeown's office, 2 individually and the other 2 together. When McDaniel's individual turn came, McKeown told her that they wanted to discuss the Union, and McDaniel said she would prefer to return to her job. Deane said that he thought she knew how he felt about a union "and there is no doubt in our mind as to how

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(Footnote continued from preceding page)

gist personally interviewed employees about their attitudes, subsequent to a strike and prior to an election. The relative tendency of such direct examination to intimidate identifiable employees is plainly absent in the present case, where employees anonymously filled out forms. And cf. *Apple Tree Chevrolet, Inc.* 237 NLRB No. 103, where an employee opinion survey conducted by the same psychologist as in *Dunn Brothers* was held not to be coercive interrogation because there was no reference to union activities.

[7]McDaniel is alleged to have been discriminated against by Respondent's refusal to reinstate her after her discharge on October 25. The parties acknowledged that, as an office clerical employee, she was outside the appropriate bargaining unit.

you feel." Further discussion by McKeown about the disadvantages of the Union and Respondent's past beneficence to McDaniel followed, according to McDaniel: "[W]e had been one big happy family and any time I wanted to come in and talk, I was able to do that. If a union came in, I would not be able to do that and they did not want a third party. Then he went on to tell me that the plant had been good to me. They had given me a leave of absence they had given no one else. They gave me a special vacation that they gave no one else."

Testifying about the interview, McKeown and Deane basically confirmed McDaniel's account, except that McKeown stressed that the special considerations given her were only alluded to in response to her assertion that Respondent had done nothing for the employees. Also, while McKeown could not recall reference to a "third party," Deane remembered "talking about having a third party involved in the relationship . . . . We expressed to her the danger or the problem there would be when dealing with a third party, that our atmosphere that was in our department was very easy, very lax, open-door policy, first-name basis."

In my view, the conversation with McDaniel did not constitute "interrogation," because no questions were asked. I am further inclined to believe the testimony of McKeown that he referred to the special consideration given to McDaniel in the past only in response to her claim that Respondent had done nothing for her.[8] I also doubt that McDaniel and the other employees felt coerced by being called into McKeown's office, since they spent their work-

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[8]McDaniel testified that the interview lasted for more than 30 minutes. Her brief testimony at the hearing plainly did not capture its full scope.

ing life immediately outside that office and were frequently in the managers' offices.

The fact that a union is selected does, to some extent, necessarily formalize the relationship between employer and employee, usually substituting a written code of behavior for prior discretion and making unlawful direct employer-employee negotiations about changes in, or deviations from, existing practice. There is no prohibition against pointing out that fact. However, McDaniel testified that McKeown said that "[i]f a union came in, I would not be able" to "come in and talk," as she had in the past. While I do not generally find McDaniel's testimony reliable, see *infra,* here I think that Deane's testimony confirms her version ("the danger or the problem there would be when dealing with a third party, . . . open-door policy, first-name basis"). The Board has recently found unlawful, as a threat of loss of benefits, "the message that all direct dealings between the employee and the Respondent would be banned." *Sacramento Clinical Laboratory, Inc.,* 242 NLRB No. 136, sl. op. p. 3. While I doubt that McKeown intended to violate the Act by this remark, I conclude that he did so.

C. The Restriction of Stephen Bolding and James McDaniel; The Alleged Promise to Bolding

The complaint alleges that Respondent violated the Act when, in the first part of October, supervisor Yalchin Ozbey "restrict[ed] employees' movement within the plant because of their support of the Union."

Stephen Bolding, a maintenance mechanic, was openly and intensely active in the Union's behalf, handbilling on some 20 occasions. Bolding testified that his primary work lay in repairing breakdowns in production equipment, and

that, absent such work, he concerned himself with the air-conditioning system.

As a maintenance mechanic, Bolding "was authorized to go everywhere in the plant." About October 3, Bolding's foreman told him that he and fellow mechinic James McDaniel, also a Union solicitor, were not to go into the knitting department to perform their routine air-conditioning work—"if we had a job to do in there, he would tell us when to do it." Several days later, Bolding asked Yalchin Ozbey, the plant engineer and a statutory supervisor, the reason for the new procedure. Ozbey replied that he had had a complaint from foreman Carpenter that Bolding and McDaniel were keeping employees from their work. Bolding responded that they were doing nothing more than they had in the past, and the "only thing that had changed was the topic of conversation that had gone from hunting and fishing and girl friends to union talk." Ozbey replied that "he had not known if it was true or not but he had to take some kind of action." Bolding testified that he and McDaniel were taken off the air-conditioning work for "approximately a week to 10 days."

Ozbey testified that it was brought to his attention that Bolding and McDaniel, while working on the air-conditioning, "were talking to knitting production people and taking time." He therefore assigned them to other maintenance projects. He further said that, during their conversation about this restriction, Bolding asked Ozbey if he was being removed because he was a "union man." Ozbey said no, but, out of "curiosity," went on to ask, "Are you really taking the time and discussing the union subject and he told me yes." During the period of their removal, no one assumed their routine, two-hour-a-day job of recording temperature and humidity and changing charts in the knitting area, and apparently an outside contractor performed some work on the air-conditioning system. On

occasion in this period, however, the two were sent into the area to perform emergency work on air-conditioning. When the machine relocation projects to which they had been assigned were completed, they were reassigned to their former work on the air-conditioning. When they were reassigned, Ozbey told them "don't take your time and discuss with people."

I think General Counsel correctly asserts that the restriction was unlawful. Ozbey's testimony makes it clear that Bolding and McDaniel were temporarily reassigned because of a complaint that they were discussing the Union with production employees, and not because of any exigent circumstances. Bolding's testimony that conversations with other employees had been commonplace in the past is unrefuted.[9] Plainly, Respondent was most interested in calling a halt not just to discussions, but to discussions about the Union; Ozbey did not settle for a cautionary reprimand, but rather removed Bolding and McDaniel altogether during a period probably thought important to the Union campaign, and, indeed, arranged the air-conditioning repair work to coincide with this removal.

This rearrangement of work location, aimed at stifling talk about a union in circumstances in which mere idle talk had been tolerated in the past, violates Section 8(a)(1).

It is alleged that Ozbey violated the Act by "soliciting employee grievances by telling them they could always come to him if they needed more money or had a problem, in order to dissuade them from supporting the Union."

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[9]The only testimony presented by Respondent on this point was given by supervisor Edgar Perkins, who thought, but was not sure, that he had reported Bolding and McDaniel for excessive talking. The only way he could distinguish these two employees from all the rest of the increased talking which was occurring in the plant was that "they had more freedom to go around in all the areas of the knitting department than the other employees."

In the course of a meeting by Bolding with Ozbey and supervisor Brown about a work-related matter on October 21, requested by Bolding, Ozbey raised the question of what unions could do for employees, and there was some discussion of the lack of competency of the operators and of unions in general. During the discussion, Bolding testified, Ozbey said that he had "an open door policy and that any time we had a problem, we could come to him and talk about it. If we did not think we were being paid enough, we could come and talk to him about it and see about getting more money. His door was always open." The meeting closed with Ozbey stating that "no matter what my feelings or views were about the Union, that I was assured a job there at Gordonsville Industries and I did not have anything to worry about."

In testifying as to the October 21 conversation, Ozbey said the "subject turned to union"[10] and he said that he wished to express his "personal opinion as a private citizen, not as a plant engineer." He gave Bolding his general view of unions, here and abroad. Ozbey further testified that he told Bolding that he had an "open door" policy, the same as he had told his employees, including Bolding, in periodic meetings during his 3 years as a manager: "Everybody is free to come and discuss with me all their personal problems, business problems, any problems."

General Counsel adduced no evidence to rebut Ozbey's testimony that he had periodically told his employees of his "open door" policy and their right to discuss "any problems" with him. That being so, I do not view this restatement of that policy as an "implied promise to remedy grievances;" it was, rather, a reiteration of an old promise. I do not regard that as violative.

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[10]Ozbey was uncertain whether he or Bolding broached the subject.

D. The Allegations Relating to Frank Baugher

The complaint alleges that Respondent violated the Act by the conduct of Harry Fernandez, on October 22, "in threatening employees with discharge because of their activities on behalf of the Union," "in threatening employees with more onerous working conditions because of their activities on behalf of the Union," and "in creating the impression of surveillance of employees' union activities;" and in October and November, "in interrogating employees concerning their activities on behalf of and in support of the Union."

Employee Frank Baugher testified that he was active in behalf of the Union, handing out leaflets along the road to the plant, wearing Union shirts and buttons, and soliciting employees to attend meetings. He said that during the first week of October, while conversing, for the first time, "about the union" with Harry Fernandez (concededly a statutory supervisor and, more specifically, Baugher's supervisor), Baugher told Fernandez that he "had gone to the union meeting the night before and he asked me who all was there." Baugher mentioned a few names and Fernandez "asked what we talked about and I said we talked about the union." Baugher could not recall who first raised the subject of the Union in this conversation.

Baugher further testified that on October 22, while talking to Fernandez in the dye office, Fernandez "told me that all of the union leaders, the ones seen out on the road handing out pamphlets, would be gotten rid of. He said there was going to be a list of pro-union and anti-union and the undecided. And he said that the pro-union would be scratched off like this [making an 'X' gesture with his finger]." Fernandez further said it "would be very close to—what the Company decided who was for the union and who was against. He said it would be very close because

he had gone through that before." Fernandez also stated that Baugher "would be coming up with a lot of mistakes, he said mistakes that nobody would believe. He said you'll be driving down the road and on your way to work and say to yourself, damn it, I've got to go through all this bullshit again." Fernandez went on to say that "if they told me to get rid of you, I'd have to do it because my job would be in danger if I didn't . . . . He said that he would be willing to bet that within three months or ninety days I would be gone." Fernandez also asked Baugher "if [he] knew how many people in that department were for the Union." When Baugher replied in the negative, Fernandez said, "there's one," eventually identifying the sole Union supporter as Baugher himself.

Fernandez denied ever asking Baugher about union meetings. He also denied any reference to getting rid of union leaders, but he did recall snippets of conversation which might have accounted for some of Baugher's testimony. For example, he once described to Baugher an election held at a previous employer of Fernandez, in which the company had kept a list of pro-union and anti-union employees, "to give management an idea of how this election would go." He also remembered another talk in which he told Baugher of an earlier employment in which he disliked the supervisor so intensely that he dreaded the prospect of going to work; on cross-examination, however, Fernandez said this was "possibly" uttered in the context of a discussion about the Union. He asserted that "every day [Baugher] would have a question for me" about the Union and other matters, and they spoke "many times" on the subject of the Union.

Fernandez was an emphatic, almost theatrical witness on direct examination, but his cogency lost force on cross. I thought Baugher a very honest witness and I do not believe that Baugher constructed the vivid October 22 con-

versation out of whole cloth or distorted it in any significant way. Accordingly, I credit the testimony of Baugher.

I do not find that the conversation during the first week of October constituted unlawful interrogation. Since Baugher could not recall who raised the subject of the Union meeting, it may well have been Baugher. If it was Baugher, he was obviously ready and willing to discuss the subject with Fernandez. Since Baugher would have plainly invited them, questions by Fernandez, in response to Baugher's possible introduction of the subject, were only natural and could hardly have been considered by Baugher a menacing employer interest in union activities.

In the October 22 conversation, however, Fernandez violated Section 8(a)(1) by threatening that the Union leaders "would be gotten rid of," that Baugher would find himself "coming up with a lot of mistakes," and that in 3 months, Baugher "would be gone." Contrary to the complaint, I do not find in Fernandez' remarks any impression of surveillance of Baugher's activities. Baugher had made his position on the Union publicly known and had previously discussed his union activity with Fernandez; when Fernandez identified Baugher as the only departmental Union supporter, that association of Baugher and the Union could hardly have been thought by Baugher to have been derived from "surveillance."

General Counsel amended the complaint at hearing to allege that Respondent had violated Section 8(a)(1) "by implying that personal property of employees had been damaged by the Union." Baugher testified that in a conversation "about the union" with Charles Arruda, superintendent of dyeing, on the day before the December 6 election, Arruda said that "he didn't think that acid had been poured on anyone's car before the Union tried to get in . . . and he said he had a good job, good family, nice home and he didn't want his house burned down and he

didn't want to have to leave the state of Virginia." When Baugher said that he did not think the Union was responsible for the damage inflicted, Arruda said "that was the way the union worked."

Arruda did not testify. I do not view the remarks made by him to Baugher as unlawful intimidation. Testimony subsequently given on Respondent's behalf establishes that vandalism had occurred. Arruda's stated belief that the Union had caused or been responsible for it was simply "[t]he expressing of . . . opinion . . . contain[ing] no threat of reprisal or force," which Section 8(c) protects. Employer anti-union campaigns often include gratuitous references to union violence, and such comments are normally held to be within the limits of fair comment. I recommend dismissal of this allegation.

E. The Allegations of Unlawful Conduct Addressed to Betty Figgins

The complaint alleges several instances of threats, and one promise of benefit, directed by foreman Woody Carpenter toward employee Betty Figgins.

Figgins, who distributed union literature inside and outside the plant, testified that on October 26, her foreman, Woody Carpenter, told her that two employees had been discharged on the preceding day; when Figgins sought their identity, Carpenter said she would find out. As he started to walk away, Carpenter turned and "said if this union is voted in, the plant would shut down."

Around November 3, Carpenter, after asking Figgins if she had received a Company letter about strikes, told her that if the employees struck, they would receive sparse strike benefits and the Respondent would "just hire somebody else and give them our jobs." When Figgins denied the Company's right to do so, Carpenter said "something

about economic or noneconomic strikers and whatever it takes, that they could do that, just hire a person permanently and give them our jobs and they don't have to take us back." He further noted that the Union "wasn't any good, that the only good union was the Steelworkers or a railroad union or the kind that A & P and Safeway have."[11]

On November 4, Carpenter "started talking to me about people losing their jobs. And he said that whether the union came in or not, it was a lot of people going to be fired. And I said you can't fire anybody without a reason and he said that wouldn't be hard to find."

On November 16, Carpenter came to Figgins' work station and "told me that he was going to talk some sense into my husband. And he said if both of us was going to be for the Union, why didn't we just keep quiet and go ahead and vote, that way it would be better for Bill." When Figgins asked if her husband's job was in jeopardy, Carpenter replied, "You'll find out."

Carpenter continued by saying that another employee's wife had been "fired because she had talked to somebody about trying to get a union in there."[12] When Figgins said the employees had no benefits, Carpenter stated that "they was working on some, that they were working on a retirement plan." Figgins asked when the employees would receive the benefit, noting that it would not likely be given

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[11]At the hearing, General Counsel took the position that this matter related only to paragraph 6(d) of the complaint, which alleges violations by telling employees that "even if the Union won the election, the Employer could refuse to offer anything during contract negotiations and employees would be forced to strike."

[12]General Counsel's brief asserts that the words "at Doubleday" should follow the word "fired." My notes do not indicate that this omission occurred, and I therefore deny the motion to amend the transcript. The circumstances indicate, however, that Carpenter was not speaking of a discharge by Respondent.

on the scheduled election date. Carpenter replied, "[N]o, but we can give it to you the day before that." Carpenter went on to say that "when the union came in, the company wasn't going to give us anything so what was we going to do, go on strike."

"[A] few weeks before" the December 6 election, Carpenter told Figgins that if the Union won, the employees would have to strike because "the company wouldn't give us anything else." He went on to threaten that Respondent "could just shut down and move away or another country [sic] and leave us here with nothing and nobody else would hire us because they would know we had something to do with the Union."

At some time prior to the hearing, Betty Figgins was promoted to lead person position.

Woody Carpenter, a poor witness, generally could not "remember" any such conversations with Figgins, because he could not recall "that far back," and there was "conversation going on everywhere." He stated, however, that "[i]t's a possibility" he may have expressed an opinion that the plant would close, in response to questions posed by employees, and that he "could have" discussed other matters alleged by Figgins. On the basis of the convincing demeanor of Figgins and her detailed testimony, weighed against the unimpressive testimony and half-admissions made by Carpenter, I credit Figgins.

The remarks uttered by Carpenter on October 26 and "a few weeks" before the election, to the effect that the Respondent would or could shut down, violated Section 8(a)(1). The reported conversation of November 3, as expressly limited by General Counsel's representation at hearing of the pertinent allegation, does not support that allegation. Carpenter's November 4 threat that "a lot of people [were] going to be fired" was violative, as was the suggestion on November 16 that Figgins' husband might lose

his job. In that same conversation, Carpenter further gave voice to unlawful remarks by stating that "when the Union came in, the company wasn't going to give us anything," and that the Respondent was "working on a retirement plan" for the employees. The statements, a "few weeks" before the election, that the employees "would go out on strike because the company wouldn't give us anything else," and that the Company "could just shut down and move away," were equally violative. I do not construe the comment made in the final reported conversation to be a separate act of threatening to blacklist; "nobody else would hire us because they would know we had something to do with the Union" is a prediction based on probable local attitude, not a threat to cause that attitude.

F. Conduct Relating to William Figgins

William Figgins was an active solicitor and handbiller for the Union. The complaint makes allegations of unlawful conduct with respect to him.

On or about October 17, while Figgins and employee Dickerson were working on a machine, foreman Woody Carpenter approached and told Figgins that he "ought to get out of the union and not get involved any more than what I already had." In the course of conversation, Carpenter said "there was about fifteen people including [Figgins] who would be fired," and further stated that, because of "a little black book" management was keeping about the employees, they would not "be able to find a job anywhere in Orange County." Figgins replied that he was not worried because he could move away; Carpenter responded, "[Y]ou're going to have to go a long ways because you won't get a job around here anywhere. He said none of them will." Carpenter went on to speak of Figgins "los[ing] my house and everything."

Carpenter completely denied that any such conversation occurred. I have discredited Carpenter above, and here, as well, I prefer the testimony of William Figgins, a plainly reliable witness.

The threat of discharge leveled at Figgins and others violated the Act. Further, and unlike the case of Betty Figgins, Carpenter's statement that Respondent was maintaining "a little black book" on the employees, which would prevent them from obtaining other jobs, clearly constituted an unlawful threat of blacklisting.

The complaint alleges that prior to the election, supervisor Edgar Perkins engaged in unlawful harassment of Figgins, "by his conspicuous observation of [Figgins'] work performance," in violation of Section 8(a)(1); and that around November 15, Perkins told Figgins that Respondent would offer the employees nothing during contract negotiations and would force a strike.

Figgins testified that the tedious nature of his work as a mechanic in the knitting department had necessitated, during his prior two years of service as a mechanic, occasional informal breaks in the routine, in which he would have coffee, go to the restroom, or chat with other employees. These work interruptions were tolerated by supervisor Perkins "up to about three or four weeks before the election," when Perkins began "to follow me and tell me to get back to work. If I was talking to somebody, he would get on me." On "several" occasions when Figgins was in the bathroom, Perkins would look in the door and, if Figgins was speaking to someone, would tell him to return to the machine he was repairing. After the election, however, Perkins' acceptance of such behavior "gradually . . . went back to normal."

During this period, Perkins would hand out anti-union literature to the mechanics, and would always insist that Figgins read his copy then and there, although he would

not impose the same requirement on the other mechanics. On one occasion, about November 16, when Figgins responded to a piece of literature by asserting that the Union would be beneficial to the employees, Perkins said that if it was up to executive vice president Gehring, "We wouldn't get anything anyhow."

On or about November 18, while Figgins was engaged in conversation with two other employees about work matters. Perkins called him over and told him to "quit harassing people." When Figgins asked whom he had been harassing, Perkins said "I'll tell you that when I follow you."

Figgins conceded that he had been "personal friends" with Perkins for the past few years, that he and Perkins spoke of the union movement many times, and that on these occasions he expressed his own opinion.

Perkins testified that after September, "people seemed to want to talk more than they did work," that part of his job involved "watching" employee working habits, and that he did not watch Figgins more than any other employee. He said that he stopped employees from congregating in the restroom before, during, and after the preelection period. He testified that his procedure in handing out company literature varied; sometimes he would wait while an employee read the paper to see if there were any questions, sometimes he would leave and then return.

Perkins denied attributing any mindset to Gehring. As to the incident in which he allegedly told Figgins to stop "harassing" people, Perkins said that he had received a "statement," perhaps from Phillip Skipper, a foreman, that Figgins had been "out of his work area and was harassing people, trying to persuade them one way or the other out of his work area." Although unsure what the goal of the "persuasion" was, "it could have been" about the Union. He called Figgins aside, told him of the complaint, and asked him to stay in his work area. Perkins conceded that

the anti-union handouts he made to his set-up mechanics, approaching a level of every other day as the election drew near, consumed an average of 20-30 minutes, in total, of their work time on each occasion.

Figgins was an impressive witness; Perkins was not. Based on Figgins' testimony that his social intercourse with other employees, previously accepted, did not increase during the preelection period, and his testimony that Perkins nonetheless began to chide him for conduct tolerated prior thereto, one must infer that the harassment was occasioned by Figgins' known support of the Union.[13] Perkins' professed concern for a drop in production in the winter of 1977 (to an extent unknown to him) is somewhat belied by the time deliberately consumed in handing out anti-union literature to the mechanics every other day prior to the election. Riding herd on an employee in this manner because of his union sympathies violates the Act.

I think the reference to Frank Gehring—that "if it was up to Frank Gehring, we wouldn't get anything anyhow"—presents a more difficult issue. General Counsel argues that this is a "flat-out renunciation of any and all bargaining." A stark declaration of the futility of bargaining would be, I agree, violative, but the statement attributed to Perkins seems, as Respondent argues, ambiguous. Gehring was thought of by Figgins as the "plant manager;"[14] in that view, he was not likely to make final decisions about contract offers. A normal reading of the remark ("if it was up to Frank Gehring") suggests not only that it might *not* be up to the "plant manager," but also, as

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[13]This occurred long after the period during which Figgins solicited cards, which he concededly did on the production floor on a number of occasions in September.

[14]As discussed *infra*, confusion abounded during this period about the authority vested in the various managers.

Respondent contends, that other responsible members of management might have contrary views. The attendant uncertainties lead me to believe that no violation should be found here.

G. Statements Made to Thomas Dillon

At the hearing, the complaint was amended to allege that Respondent violated the Act on or about November 23, 1977, by "telling employees that conditions would improve if they rejected the Union."

Employee Thomas Dillon testified that he was among a group of employees addressed on the day before Thanksgiving by president Michael Gottlieb, executive vice president Gehring, and personnel director Jim Loudon. They announced that they were there "to feel out any problems that we had," stated that they were not there to make promises, and then asked for questions. After the meeting ended, Dillon and two other employees continued to talk to Gehring, rehashing grievances brought up at the meeting, and eventually Gehring's "voice got kind of low and he said listen, give us another chance, that's all we need. We can straighten these things out on our own and you people can do this just as well in six months as you can now."

Also as amended at the hearing, the complaint charges that Respondent violated Section 8(a)(1) on or about November 29 "by disparaging the Union and by promising employees better working conditions in order to dissuade them from supporting the Union."

Dillon testified that on November 29, President Gottlieb came to Dillon to give him an answer to a question raised by Dillon at the November 23 meeting. After discussing Dillon's complaint, Dillon said he "had been catching a lot of flak and crap from these jobs and after the Union got in, I didn't think I would have to anymore." Gottlieb an-

swered heatedly that "the only thing the Union would do was fuck us and take our money." Gottlieb then "calmed down and apologized for the remark and said that he shouldn't have made the remark and that he was getting excited and off the subject." The discussion resumed and subsequently the following occurred:

> He said that if the Union came in there would be trouble and then he said do you want a promise. He said I can't make you a promise and he said but hell, I'm going to do it anyway. He said we can get things straight ourselves, just give us the opportunity. We don't need anything else to do it.

Gehring did not testify about the November 23 meeting with Dillon. He did say, with respect to a series of meetings held with plant employees in November, that management officials did not make any promises at the meetings themselves (Dillon agreed) because they had been advised that "we couldn't promise or threaten." While Gehring, who testified on behalf of General Counsel, also said he did not meet "individually" with employees until December 5, as hereafter discussed, the Dillon encounter was the aftermath of a group meeting, and two other employees were present.

Gottlieb admitted that, on November 29, he "blew up" at Dillon's rosy vision of the Union's promise. He attributed this to irritation stemming from threatening phone calls recently received by him and his wife (which, I find, likely occurred). He said that he told Dillon that, procedurally, the presence of a union would cause "trouble" because of the necessity of going through a shop committee to get things accomplished, and that he used the word "promise" innocuously, only in the sense of "predict" ("I can promise you that relative to getting these changes done that you'd

like to get done, you're going to have as much trouble with a union here as without a union here.")[15]

Dillon was an excellent witness. His testimony that Gehring asked for 6 months in order to "straighten these things out on our own" appears to be a promise of benefits for repudiating the Union, prohibited by Section 8(a)(1). While Respondent argues that the usage "can straighten" rather than "will straighten" implies that no "promise" was made, the request that Dillon "give us another chance" plainly implies that Respondent was vowing to right the grievances which had brought the Union movement to the fore.

Fayette Cotton Mill, 245 NLRB No. 64, raises a serious question as to whether disparagement of a union can be a separate violation. In any event, Gottlieb's immediate and effusive apology for his angry remark on November 29 removed any sting the outburst may have carried. I would not find an independent violation on these facts, particularly since the breach would be borderline at best, carrying little or no connotation that the auditor was in jeopardy.

I was impressed by Dillon, and I think it unlikely that Dillon concocted the claim that Gottlieb told him, on November 29, "I can't make you a promise . . . but hell, I'm going to do it anyway . . . [W]e can get things straight ourselves, just give us the opportunity." This express promise to improve working conditions in exchange for a vote against the Union is, of course, violative.

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[15]Respondent moves to insert in Gottlieb's testimony the statement that Dillon "was trying to bait me." Neither my notes nor my recollection support such an amendment of the transcript.

H. The Alleged Conferral of a Profit-Sharing Plan

The complaint, as amended, charges that Respondent violated the Act by "conferring" a profit-sharing plan upon the employees on December 5.

On the day before the election, several of Respondent's highest-ranking representatives, including president Gottlieb and executive vice president Gehring, met individually with employees and handed them statements informing them of amounts which had assertedly accrued to their accounts in a profit-sharing plan. It is clear from the record that the employees had never previously been notified of the existence of the plan, much less its details.[16]

Because there will be frequent reference to him hereafter, I shall discuss at this juncture the role of Tom Forshee at the plant after September 26, as well as the relative authority of the various plant officials.

Tom Forshee was one of the employees of SESCO who, as earlier stated, was detailed by that firm to help conduct the employee survey made at Gordonsville on September 26-27. He continued thereafter to maintain a connection with Respondent, to assist in guiding Respondent through the shoals of the Union campaign, and, although Forshee was only at the plant periodically, he assumed considerable authority over personnel matters. While the evidence is confusing, it appears that in around mid-October, Gary Miller, who had been acting as plant manager for a while, lost personnel responsibilities and was more-or-less confined to overseeing the production aspect. The record

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[16]Foreman Woody Carpenter testified that when employees would question him about the existence of a "retirement" plan, he "could have said" that "everyone in the plant had the same retirement plan, we was told. Nobody knew anything about it. I didn't know anything about it. It hadn't been finalized yet."

shows, however, that even into November, many employees and some supervisors continued to regard Miller as the plant manager, and he occasionally so acted. Executive vice president Gehring assumed the role of acting plant manager, but he maintained little or no authority over personnel and employee relations matters, which were controlled by Forshee, who "reported directly" to Gottlieb. Gottlieb testified that beginning in October, he took a more active interest in the plant, and spent an average of 3 days a week in Virginia.

Forshee and Gottlieb testified that the election-eve notification to employees was provoked by Union propaganda that no retirement plan existed, a piece of misinformation which they thought required rebuttal. The allegedly provocative Union leaflet, distributed on December 2 or 3, depicted a graveyard, with accompanying text describing a pension plan then in effect at Liberty Fabrics "according to the pension formula on file with the Department of Labor by our company." The message of the leaflet was that an employee who had started work in 1960 and was employed for 30 years would receive a very small pension, as compared to the more generous entitlement of the president and executive vice president of Liberty, and that an employee who commenced work after 1972 would receive no pension at all.

The plan to which the Union was referring was apparently a fixed contribution pension plan which had been in effect for several years and which, as discussed below, was "frozen" in 1976 because Respondent felt that continuing with a fixed contribution plan could cause it to "go broke,"[17] Accordingly, in November 1976, Respondent

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[17]It appears to me that General Counsel's generally excellent briefs errs here in asserting that "only managerial employees" had

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adopted a retirement plan based on profit-sharing. The Union apparently had not known of this development in preparing the "graveyard" leaflet.

In order to respond to the graveyard leaflet, Gottlieb *et al.* personally distributed to all the employees form statements, appropriately filled in, reading as follows:

> Dear _____
>
> On December 31, 1976, the company made a contribution to your individiual retirement account in the amount of _____. Contributions by the company to your account in future years will be based on the profitability of the company. The next contribution to your account will be made at the end of this year.[18]

In construing Section 8(a)(1), the Supreme Court has stated, in *N.L.R.B.* v. *Exchange Parts Co.*, 375 U. S. 405, 409:

> We have no doubt that [Section 8(a)(1)] prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is

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participated in the pension plan. I read Gehring's testimony, on which General Counsel relies, as stating just the opposite. Gehring said that prior to the enactment of ERISA in 1974, the plan had applied only to managers, but it was thereafter amended to cover rank-and-file employees. The Union leaflet plainly indicates that at least some employees were covered by the plan, according to the documents evidently obtained by the Union from the Department of Labor.

[18]Betty Figgins testified that the amount entered on the form given her was $142.57.

> reasonably calculated to have that effect. . . . The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of the benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

It hardly needs saying that the announcement of a new benefit as substantial as a profit-sharing plan on the literal eve of an election[19] invites close and serious scrutiny as to whether the announcement was made "with the express purpose of impinging upon [employee] freedom of choice." The Board has consistently held that the granting of increases prior to an election raises a "presumption of impropriety which can be rebutted only by an affirmative showing that the benefit was governed by factors other than the impending election." *Idaho Candy Company*, 218 NLRB 352, 355; *Schwab Foods, Inc.*, 223 NLRB 394, 406; see *N.L.R.B.* v. *Styletek, Division of Pandel-Bradford, Inc.*, 520 F. 2d 275, 280 (C.A. 1). The cases hold, in short, that the showing of "express purpose" required by the Supreme Court is so inherent in the grant of preelection benefits that it is fair to infer an improper motivation behind such a grant absent a satisfactory explanation for its sudden bestowal.

One avenue of employer exoneration in the past has been a demonstration that the suspect benefit had been conceived and implemented prior to the union's arrival, and that the preelection announcement simply made known to employees a predetermined and existent benefit, legiti-

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[19]The announcement actually extended into election day, since Respondent began passing out the statements on the morning of December 5 and did not complete the task until 2:30 a.m. on December 6.

mately processed and unveiled in accordance with the dictates of business constraints, not union considerations. *Field Container Corporation,* 178 NLRB 536; *Domino of California, Inc.,* 205 NLRB 1083; *Mr. Fine, Inc.,* 212 NLRB 399, 402. To qualify for this exception, however, employers must establish that the benefits were "pre-determined" in the sense that "they were already existing or that the employers had made a binding commitment to put the benefits into effect regardless of the outcome of the election." *N.L.R.B.* v. *Arrow Elastic Corporation,* 573 F. 2d 702, 705 (C.A. 1).

Thus, in *Arrow,* the employer was found to have violated the Act by announcing to employees that a pension plan was to be added to the existing profit-sharing program. The fact that the Respondent had undertaken development of such a program long prior to the union effort and had even informally announced to employees, before the campaign, that there "would be" a pension plan, was held to be no defense, since the plan had not been formally approved by the Arrow board of directors until after the election: "until the plan was signed, Arrow was free to abandon its program at any time or to alter the provisions of it." *Ibid.* It may be argued, on this reasoning, that the gravamen of the offense was less the announcement or grant of a benefit than a misrepresentation that such a benefit had been granted. The effect on the election of such a misrepresentation would, of course, be as substantial as the announcement of a true and fixed benefit.

That the genesis of the announced benefit may be faultless, however, does not necessarily end the inquiry. "Predetermination alone is not determinative, the timing of the announcement must also be considered," *Arrow Elastic Corporation, supra,* 573 F. 2d at p. 706; "Wage increases and associated benefits may well be warranted for business reasons; still the Board is under no duty to permit them

to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice." *N.L.R.B.* v. *Styletek, supra,* 520 F. 2d at p. 280.

Respondent argues (1) that the profit-sharing plan was predetermined, fixed, and free of union-related taint; and (2) that the announcement of the plan was a legitimate response to the graveyard leaflet. In my view, the announcement was improper under the cited authorities, for the reasons given below.

Discussion is complicated by both a serious paucity of evidence clarifying the origin, development, and implementation of the plan, and by Respondent's troubling testimony concerning these matters. There are only three documents in evidence bearing upon the plan at all: two are copies of Respondent's annual reports for 1976 and 1977; the third, introduced by General Counsel, is a letter sent by Gottlieb to all employees after the election which contains a few assertations about the status of the profit-sharing plan at that time.

The 1976 annual report briefly states that Respondent has a "non-contributory pension plan for its eligible employees who meet the minimum service and age requirements," and that in 1976, Respondent amended the pension plan and "adopted a non-contributory profit sharing plan for the same employees." The report further states, "The Company may amend, modify or terminate either or both of the plans, in whole or in part, at any time."

President Gottlieb testified that in 1976, Respondent "approved and passed the profit sharing plan and agreed that the pension plan could not go on into the future because it had been multilated during the bad years of '71 and '72." Oddly, the 1976 report, dated February 1977, makes no reference to this termination of the pension plan.

The report for 1977, dated March 1978, does. It states, in part:

> The Company's Non-Contributory Profit-Sharing Plan covers all employees meeting the eligibility requirements. The Company may amend, modify or terminate the Plan, in whole or in part, at any time. Contributions to the Plan are discretionary and based on current and accumulated profits but may not be less than 5% of pre-tax book income, as defined in the Plan. The policy of the Company is to fund contributions so determined. Because of the establishment of the Profit-Sharing Plan, the Company's Non-Contributory Pension Plan, which covered the same employees, has been frozen, effective December 1, 1976, by discontinuing the accrual of future benefits to participants after such date.

The remaining relevant document in this record is a letter, signed by Gottlieb, mailed to all employees sometime after February 1978. It informed them that Respondent's board of directors had approved "on November 19, 1976 the introduction of a profit sharing plan starting with the year 1976;" that "[t]he plan was submitted to the Internal Revenue Service on December 30, 1977;" that "[o]n February 27, 1978, the Internal Revenue Service acknowledged receipt of our plan;" that "[w]e are now waiting for a qualified letter of determination from the Internal Revenue Service;" and that when the letter of determination was received, a formal summary of the plan's provisions would be forwarded to the employees. In the interim, and in anticipation of receipt of the letter of determination, Respondent enclosed with each letter "individual profit sharing plan certificates" showing the amount of contributions made to the account of each employee in

1976 and 1977, and indicating the "cumulative account balance . . . at December 31, 1977 and how much of that amount is vested, i.e. your money."

The record is singularly devoid of the sort of basic documentation one might have expected regarding the creation and development of this plan. Despite a reference at trial to my assumption that such evidence would be presented (and a rejoinder by counsel for Respondent that it "certainly could" be), there are no minutes showing the action taken by the board of directors on November 19, 1976, respecting "the introduction of a profit sharing plan," no evidence of the "contribution to your individual retirement account" made on "December 31, 1976," no copy of a plan or trust agreement, none of the materials which surely would have been generated by adoption of such a program. The claim in the December 5 letters, and Gottlieb's testimony, that monies had been actually "contributed" on December 31, 1976, is hard to accept in view of Gottlieb's confusing testimony about Respondent's calculations of amounts due employees under the plan "formula." Thus, on a single page of the transcript, he said that "the information regarding the amount of money in each employee's account became available" only "[v]ery close to the election," but then immediately said that "that calculation [was] completed" in "June, no. May." Neither date, however, would have permitted the asserted "contribution to your individual retirement account in the amount of $_____" on December 31, 1976.

Under the teaching of *Arrow* and other cases, an employer may not assert that this employees enjoy a benefit unless the benefit is *in esse*. I am inclined to think that as of December 5, 1977, there was some sort of profit-sharing plan in some stage of development, based on the statement in the 1976 annual report that "[d]uring 1976, the Company . . . adopted a non-contributory profit sharing plan."

Respondent has not demonstrated, however, that the "adoption" constituted a legal commitment in any sense; in the words of the *Arrow* court, "until the plan was signed, Arrow was free to abandon its program at any time or alter the provisions of it." It is a fair inference, in fact, that the plan was still in evolution on December 5, 1977, considering that, as Gottlieb's post-election letter to the employees states, the plan was not even submitted to the Internal Revenue Service until December 30, 1977. The record is silent as to the lengthy delay between "adoption" of the plan on November 19, 1976, and its submission to IRS more than a year later.

Moreover, as General Counsel points out, the Board has held by implication that announcement of a benefit plan which requires IRS approval constitutes bestowal of a nonexisting benefit when that approval has not, in fact, been received. Thus, in *Domino of California, Inc., supra,* 205 NLRB 1083, the Board noted, in finding lawful the announcement of a profit-sharing plan made after the employer had received notification of IRS approval, "It was clear at that time that employee rights under the plan had vested and were no longer defeasible upon the contingency that the plan did not qualify for tax-exempt status." Accord, *Field Container Corporation, supra; Mr. Fine, Inc., supra.* Announcement to employees of a benefit whose vitality depends upon subsequent government action, without any intimation of that necessary prerequisite, plainly misrepresents the character of the "benefit".[20]

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[20]The December 5 statements handed to the employees were misleading in other ways, so far as the record shows. As previously noted, Gottlieb's testimony makes it appear highly improbable that, as the form stated, "[o]n December 31, 1976, the company made a contribution to your individual retirement account in the amount of $_____." The final sentence of the statement, "The next

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Gottlieb testified that "[o]ur taste would have been to have given them the whole plan and explained everything at one time." However, because counsel advised in September or October that announcing the plan "would have been a benefit and an unfair labor practice," it was decided that there would be no announcement. But when the Union circulated the graveyard leaflet "which pictured me as some kind of ogre trampling on the people," counsel approved telling the employees of the amount of money in their accounts — "just give them that one fact."

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contribution to your account will be made at the end of this year," connotes a finality to both the plan and the process which the status of the plan and the 1977 annual report refute. Thus, the plan had not yet received approval from IRS; absent such approval, the employees would never enjoy the benefits of the plan, no matter how many contributions were made to their accounts. The employees were not told that, as the annual report states, "The Company may amend, modify or terminate the Plan in whole or in part, at any time."

The annual report states, "Contributions to the Plan are discretionary and based on current and accumulated profits but may not be less than 5% of pre-tax book income, as defined in the Plan." The reference to "discretionary" is puzzling, but the second clause suggests that the entire sentence means, as Gottlieb testified, that contribution of "5% of pre-tax book income, as defined in the Plan" is mandatory and any amount above 5% is discretionary. However, the sentence immediately following raises a doubt: "The policy of the Company is to fund contributions so determined." One is moved to ask why, if contributions "may not be less than 5% of pre-tax book income," the Company felt free to declare a mere "policy" of funding contributions to the plan. As the Court noted in *Arrow, supra*, "The particulars of a pension plan . . . must be understood and studied to determine its value. . . . The May 2 speech by Kingsbury did not give any more detailed information about it. It was an unspecified promise of benefits to which the company had not yet made a formal, legal commitment." 573 F. 2d at p. 706.

The argument that Respondent was simply responding to the graveyard leaflet does not entirely ring true. The issue of a retirement program had surfaced several times earlier in the campaign. It may be, particularly in view of the magnitude of the undertaking involved in informing some 350 employees about the plan, that the decision to so inform them was made and being implemented prior to the graveyard leaflet, and that the latter was a mere fortuity.[21]. On the whole, however, I am inclined to believe that there probably would have been no reference to the profit-sharing plan absent the graveyard leaflet, particularly because Gehring's testimony so indicates. Nonetheless, by responding to the leaflet as it did, it is clear that Respondent engaged in "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." *N.L.R.B.* v. *Exchange Parts Co., supra,* 375 U. S. at 409. Graveyard leaflet or no, Respondent chose to notify employees, at the eleventh hour before the election, to their undoubted surprise, that they were the beneficiaries of an employer largesse previously unknown to them.

It must be supposed that to an ordinary employee, the apparition of the company president handing him a statement, on the night before the election, containing the news that "the company" had deposited funds in an account for him the previous year and would do so again in the future, must have seemed nothing less than Olympian. This dramatic demonstration of "the company's" ultimate control over benefits was "reasonably calculated" to vividly remind employees of that control. Respondent had, as

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[21]The testimony indicates that the graveyard leaflet was circulated around December 2 or 3; the statements handed out on December 5 are dated "December 3."

Gottlieb testified, deliberately chosen in past months to refrain from mentioning this unsettled benefit and for good reason — the plan not having been approved by IRS, an announcement that an unconditional benefit had accrued would indeed have been an unfair labor practice. To make that announcement on December 5, when the benefits were no more concrete than in October, was not the less unlawful simply because the Union had made a telling point in its propaganda.

This case is somewhat unusual in that here, unlike the run of other cases, it is conceded that the announcement of the plan was intended to influence the voters. "It is obvious that the closer a wage benefit comes to the day of the election, the harder it will be for the union to answer, and the greater the danger that the benefit will be manipulated to sway the election." *N.L.R.B.* v. *Styletek, supra,* 520 F. 2d at 281. Those "dangers" were obvious in this situation; Respondent brushed them aside and forged ahead, trumpeting as a fixed benefit a profit-sharing plan which was infected with uncertainty. The effect of that conduct on the election could hardly have been misconstrued by Respondent.[22]

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[22]Application of the test described by the Administrative Law Judge in *Arrow Elastic Corporation,* 230 NLRB 110, 113, would leave no doubt that the timing was impermissible: "It remains the further burden of the employer to show that its announcement was reasonably timed as a sequential step in, and a byproduct of, a chronology of conception, refinement, preparation and adoption so as to lead one reasonably to conclude that the announcement would have been forthcoming at the time made even if there were no union campaign." This test may not be invariable. Compare *Domino of California, Inc., supra,* 205 NLRB at 1083, n. 3, where the Board validated the announcement of a benefit despite the fact that its timing was not "completely unrelated to the presence of the

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I. The Wage Increase of January 1, 1978

The complaint alleges that Respondent violated Section 8(a)(1) by granting its hourly employees a 35 cent per hour wage increase effective January 1, 1978. The increase was announced to the employees on December 20, 1977, two weeks after the election. The asserted purpose was, in the words of the complaint, "to encourage [the employees] not to support the Union."

The tally of ballots in the December 6 election left the question of representation unresolved. The count of votes showed a horserace: 144 for the Union and 143 against, with 58 challenged ballots. In addition, both Respondent and the Union, by December 13, had filed objections to the election.

The Board, with court approval, has held that a presumption of unlawful interference attaches even to the grant of postelection benefits when the possibility exists that a rerun election may be held. *Gruber's Super Market, Inc.*, 201 NLRB 612, enfd. 501 F. 2d 697, 702-703 (C.A. 7); *Ralph Printing & Lithographing Co.*, 158 NLRB 1353, 1354, n. 3; *Tringle Plastics*, 166 NLRB 768, 774-775. It is therefore the Board's position that, in the present circumstances, an employer must shoulder the burden of demonstrating that the decision to grant a wage increase so soon after a hotly contested and unresolved election was a legitimate

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Union." There could be circumstances in which an employer might have a new benefit firmly in place prior to an election and might announce it earlier than he otherwise would have done for the purpose of apprising the employees of his generosity; it would seem that he would be privileged to do so, although an unexplained delay until just prior to the election might well call the announcement into question as the kind of "husbanding" designed to impinge upon employee choice.

business decision, uninfluenced by the pendency of the representation question. This standard, often difficult to apply, is aided by the Board's doctrine that the employer may establish the legitimacy of his motivation by showing that he would have granted the benefit even if the union had not been on the scene; if he fails in that effort, the inference must be that the decision was affected by the presence of the union and by a desire to influence the vote in the potential second election. *The Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29, n. 1.

Contradictory testimony explaining Respondent's decision to grant the increase was given by Forshee and Gottlieb. Prior to discussing that testimony, some background is necessary.

The record evidence on Respondent's past pay practices is not extensive. In a stipulation relating to those practices during the period from January 1, 1975, until November 1978, the parties agree that the only "general across the board wage increases" made between January 1975 and December 1977 were in July 1975 and July 1976, each consisting of 25 cents per hour. The testimony of Forshee also shows that Respondent had a practice, both before July 1977 and thereafter, of reviewing the performance of employees every 90 days and awarding acceptable employees "automatic" increases of 25 cents per hour, within, however, the existing pay scales.

This latter procedure was not as bountiful as it sounds. Respondent maintained a wage structure of 9 labor grades, into which more than 100 job classifications were slotted. General Counsel Exhibit 283 shows that the climb from the bottom to the top of each grade was not a long ascent. Thus, the differential between the minimum and maximum pay for a grade 3 worker was 33 cents; for a grade 7 employee, 31 cents. Accordingly, when a new grade 3 worker received a 25-cent raise after his first 90-day review (which the evi-

dence showed to be "automatic" in amount), he would be entitled, at best, to 8 cents as a result of the next review, and none thereafter; the only way he could improve his individual lot from that point on, absent a general wage increase, would be to receive a promotion to a classification in labor grade 4.

The resultant bunching, at the top of the grades, of new and old employees, and other considerations, led Respondent in July 1977 to abandon its (at least) 2-year-old practice of granting a 25-cent July general wage increase and to institute a new system devised by then plant manager Miller. The system consisted of immediate provision of a longevity pay factor of 1 cent per hour per year worked, for employees with 5 or more years of tenure; an increase of 4 percent of the top of the scale in each labor grade; and a procedure for reviewing each employee at 90 days and 180 days after his entry into a labor grade, and every 6 months thereafter. Unlike past practice, however, according to a memorandum written by Miller, "the automatic 25¢/hour increases" would no longer apply in these periodic reviews, and employees would receive anywhere from "0 to 25¢" as a result of such reviews, depending on their performance.

Forshee testified that the longevity pay increment was put into effect in July and continued thereafter. He further said that the 4 percent top-of-scale adjustment was "an additional increase" which "did not in any way interrupt the ninety day program that was already in effect." The 4 percent increase was implemented within 2 months: "Some time in September, all increases and performance evaluations had been completed and the paperwork processed and the appropriate increase from zero to four percent had been processed for all employees some time in September." In a "particular area of the plant, everyone got four percent. In another area, some got none, others

got put on probation and so on." Forshee said that the Miller plan continued to apply after July except that the discretionary 0-25 cent within-grade raise coupled with a 6-month review was never instituted: "[T]here was never a change from what had existed in the past . . . . [F]or the most part, the automatic 25¢ an hour increase continued because there was no computer change made."[23]

I do not find persuative management's effort to justify the 35-cent December increase; the explanation of the decision-making process raises serious problems at every turn.

The discussions about an increase were assertedly provoked by management awareness of an imminent increase in the Federal minimum wage to $2.65 on January 1, 1978.[24] Forshee testified that Respondent had "traditionally maintained" an entry level "in excess of the minimum wage," the differential prior to the January 1978 change being $2.50 as against the $2.30 minimum, and it seemed appropriate to continue that relationship by raising the entry level by the 35-cent increase in the minimum wage. He noted that Gottlieb "emphatically communicated" to him that he did not wish to acquire the image of an employer who only paid minimum wages.

Gottlieb's testimony added a new element in this respect. He said that it was necessary to maintain at least the 20-cent margin over the minimum wage because Respondent was having difficulty "get[ting] good people at 20¢ above it . . . . We surely got good people but we didn't get enough." Forshee had not testified that there had been

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[23]Although Forshee ultimately so testified, earlier testimony of his seems contradictory.

[24]The parties have stipulated that the minimum wage increased as follows: on January 1, 1975, from $2.00 to $2.10; on January 1, 1976, to $2.30; on January 1, 1978, to $2.65; on January 1, 1979, to $2.90.

any problems about attracting new employees at the $2.50 rate, and Miller's June 13 memorandum setting out his proposed wage system was diametrically contradictory to Gottlieb on this point:

> I can find no supporting facts that indicate our hiring rate is excessively low. There is the possibility that we may attract more people, more easily with a higher starting rate, but in general we do not have long standing openings at entry level. We have usually had a ready supply of available entry level applicants and more recent efforts at a changed image and techniques in the personnel area has [sic] further improved the availability of entry level applicants.

Thus, insofar as Gottlieb testified, unlike Forshee, and contrary to Miller's memorandum (the continued validity of which between June and December is not impeached by anything more probative than Gottlieb's testimony), that there had been problems in attracting worthwhile employees at even the 20-cent differential, the testimony raises a suspicion about the legitimacy of this component of the decision, particularly in the absence of any pre-union effort by Respondent to meet this perceived problem by increasing the entry level rate at an earlier time.

Just how "traditional" it was for Respondent to maintain an entry level as high as 20 cents above the minimum wage is debatable. Respondent made no proffer of evidence to establish its history in that regard. I have attempted to deduce the pattern, if any, from the stipulation, but depending upon its proper construction, the stipulation may be in error or incomplete.[25] It would, at

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[25]We know that as of December 31, 1977, the entry level was $2.50 and the minimum wage $2.30. We have not been told how

(Footnote continued on following page)

the least, have been useful for Respondent to have demonstrated the "history" of which Forshee spoke.

General Counsel argues that Respondent did not need to increase the entry level to $2.85 because, as Miller's memorandum indicated, it had a ready supply of applicants at $2.50. General Counsel recognizes, of course, that a raise to $2.65 was mandatory, but suggests that more was unnecessary, especially since the 90-day review, with the automatic 25-cent increase, would very shortly have achieved for new employees a rate of $2.90. There is something to be said for this argument, but I think it ignores the fact that Respondent had chosen a different tack prior to the Union campaign, having set an entry rate of 20 cents over the minimum wage. Respondent having made that judgment in a neutral period, I would hesitate to quarrel with a similar judgment made after the organizing began. My problem with this subpart of the issue is, as indicated, that Gottlieb testified that the entry level increase was necessitated by a hiring problem to which Forshee did not advert[26] and which Miller's memorandum refuted.

(Footnote continued from preceding page)

the entry level was modified to meet prior increases in the minimum wage. The stipulation states that aside from the 25-cent increases in July 1975 and July 1976, and two increases in 1978, there were "no other general across the board increases given to hourly paid employees . . . during the period January 1, 1975 to date." If the quoted material applied literally to the entry level, it would mean, working backward from the $2.50 wage being paid in December 1977, that it was not until July 1975 that the entry level was raised from $2.00 to $2.25; but at that time, a $2.10 minimum wage had already been in effect for 6 months. I therefore assume that some other provision was made in the past for raising the entry level to conform to federal requirements.

[26]Indeed, Forshee said that Gottlieb's "concern" with respect to the entry level wage was with his image in the community and elsewhere.

Forshee and Gottlieb testified that, once having concluded that the entry level should be raised from $2.50 to $2.85, it was further thought necessary to increase all employees by 35 cents in order to avoid a serious "compression" effect on the higher grades which would result from narrowing the differences between the pay ranges.[27] The magnitude of the decision to pay everyone an extra 35 cents was considerable. Paying 350 employees 35 cents more per hour amounts, on the basis of a 40-hour week and a 50-week year, to $245,000 per year.

I find this "compression-avoidance" contention considerably improbable. The so-called "compression" basically existed even before January 1978, when a trainee, hired at $2.50, became a $2.75 wage-earner by virtue of his "automatic" 25-cent raise after only 3 months. The record does not show the average amount of hiring at Respondent's plant, but it would seem that allowing a relatively small tail to wag a quarter-million-dollar dog was extravagant stuff indeed.

Furthermore, although this problem had necessarily arisen in the past, with other minimum wage increases, there is no evidence that any "compression" concern induced a similar reaction at those times. As indicated above, the record makes it appear most likely that the entry level was separately adjusted on past occasions of minimum wage increase. When that federal standard was increased, for example, from $2.10 to $2.30 on January 1, 1976, a concern about the compression effect would have resulted in a general wage increase of at least 20 cents, or some other figure. But the stipulation recites only a 25 cent increase in July 1975 and another in July of the next

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[27]It may be deduced from General Counsel Exhibit 283 that, as of December 1977, the entry employee earned $2.50 and the highest-paid hourly employee in the plant earned $4.89.

year; no across-the-board raise occurred in January 1976. This fact leads to a conclusion that, in the past, telescoping of the wage scale as a result of minimum wage increases was never considered a problem of such proportions as to justify a general raise.[28]

Forshee advanced still another reason for the decision to make the 35-cent increase. Forshee testified that he examined Respondent's wage records together with cost-of-living data and found that Respondent's wages had lagged behind prices. After studying the figures, he calculated that "with the 35¢ per hour, it would almost be exactly even with the cost of living for that period." The June 13, 1977, Miller memorandum took a different view of Respondent's past wage experience, noting that while the average rate of inflation for the preceding 8 years had been 6.4 percent, "[f]or the past few years, we have maintained an annual [wage] increase that approximated 7%." Foreshee testified, however, that his study led him to believe that the 4 percent discretionary raise implemented in September "was not an accurate reflection of the rate at which the cost of living had been increasing," and that the 35-cent figure was required to keep pace with inflation.

Forshee did not furnish at hearing the figures on which he based his calculations. Given the impact of the Miller plan instituted in July, however, it would seem that the 35-cent January increase was extraordinarily generous by Respondent's prior standards.

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[28]General Counsel points out that granting a flat increase to employees earning varying amounts has a compression effect of its own, since lower-rated employees thereby are awarded higher percentage increases. Miller's memorandum explaining the new pay system instituted in July 1977 pointed out that it was designed to "reduce the problems associated with flat rate additions across the top of scales; we should use a percentage at top of scale for the increases."

The two prior increases, in July 1975 and July 1976, had been 25 cents per hour. With the implementation of the Miller plan in July 1977, there were two quick payoffs. First, because of the longevity increment, all employees with 5 years or more of seniority began to earn at least 5 cents more an hour; depending on tenure, employees were increased, e.g., 5 or 10 or 14 or 16 cents per hour, in accordance with their total years of employment.[29]

Second, the discretionary 4 percent increase completed by September also yielded a considerable raise for many employees.[30] Although there is no clear documentary evidence on the subject, Forshee made it plain enough that, by September, many employees had received a full 4 percent raise, and others somewhere between 0 and 4 percent.

Thus, as of September, a hypothetical grade 5 employee[31] with 10 years employment would have received a 10-cent per hour longevity increase plus, if he was given the full benefit of the 4 percent raise, another 15-cent raise,[32] for a total of 25 cents per hour. Some employees received less, of course, but others received even more. It may be reasonably inferred that, by September, a sub-

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[29]Gottlieb testified that the facility had opened in 1960 or 1961. Records in evidence show a considerable number of rank-and-file employees whose employment began in the 1960's.

[30]While only the top of the grades were raised by 4 percent, it is reasonable to infer, from Miller's memorandum, from the narrowness of the range in each pay grade, and from the preexisting 90-day review procedure with its "automatic" 25-cent raises, that most of the employees were at the top of their grades in December 1977.

[31]Miller's memorandum states that "the bulk of employees and productive skills [fall] in mid-range labor grades of 4 and 5."

[32]General Counsel Exhibit 283 shows the top of labor grade 5, after the January 1, 1978, increase, as $4.15. Deducting the 35-cent increase yields $3.80. In order to arrive at a $3.80 figure by adding 4 percent, the pre-4 percent figure would have been $3.65.

stantial segment of the workforce had received increases almost equalling, equalling, and exceeding the 25-cent increase given in the past 2 years. For Respondent, in December, to add to those recent increases still another 35 cents to cover the cost of living displays a remarkably heightened sensitivity to employee needs.[33]

Forshee and Gottlieb advanced one more consideration in their decision—the anticipated location in the area of a company named Klockner Penta-Plast. The two spoke of the firm having hired away a few of Respondent's skilled employees; neither witness could name the employees. There was testimonial concern expressed that the plant would outbid Respondent for new employees, but Gottlieb had no information about the wage rates which the firm (which had not yet opened as of the end of the hearing in November 1978) was intending to pay. There was no reason for Respondent to believe that the arbitrary 35-cent raise would be effective to stop any leakage of old employees or loss of applicants, once the plastic company opened, and I question that businessmen give money to employees on the basis of such an insubstantial speculation.

In response to the question, "To your knowledge, did the employees have any expectation of a wage increase in the fall of '77?," Forshee said, "Not to my knowledge." It would seem most likely that the two recent paycheck increases in July and September for many of the employees made the December announcement of a 35-cent increase, almost half again as much as they had received in either 1975 or 1976, a remarkable surprise.

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[33]Forshee testified that, at meetings with employees in November, expressions of dissatisfaction with the new Miller system had been vented. That may have been so. It is nonetheless inescapably true that Forshee and Gottlieb were aware that many employees had received a substantial benefit from the introduction of that pay plan.

Coming on the heels of the unresolved election, this almost unseemly display of generosity must have been a potent reminder to the employees of the source from which all good things flow. While it may be contended that post-election benefits should be scrutinized with more care than preelection grants, it should be noted that the final result of the December 6 election was anybody's guess. The Union was ahead by 1 vote, with 58 challenges to be resolved. Not only the Union, but the Respondent as well, had filed objections to the election which, regardless of the final tally after resolution of the ballots, might have required a second election. The foregoing considerations leave little question in my mind that the carefully contrived Miller plan would have been allowed to work out its course and the employees would never have received the 35-cent raise in January had the Union not showed up in September. I find, therefore, a violation as alleged.

J. The June 28, 1978, Letter to Employees

The complaint, as amended during the hearing, charges violative conduct on or about June 28, 1978, "by sending to all employees a letter implying that their signing of authorization cards was for an election only."

On the date alleged, one day prior to a 25-cent wage increase announced on June 29, as discussed hereinafter, and 3½ weeks before this hearing began, president Gottlieb sent letters to all employees to "advise you of the status of the Union charges against your company." The letter first recites some of the charges of improper conduct by Respondent: "By giving you a wage increase of 35¢ an hour last January; By talking to you about the Union; By terminating Nancy McDaniel and Steve Bolding; and by making a survey of your needs and desires." The letter then protests the Company's innocence of misconduct and goes

on to state that "the Union demands because of these issues that we be required to bargain with them even though you may have voted *NO UNION*." The letter continues:

> We think that if you signed the Union Authorization Card you were only asking for an election, with the right to vote YES or NO UNION. I am sure you did not expect a Union without an election to determine your choice.
>
> The Union or the Labor Board may require that you attend a hearing in order to question you regarding the above issues. You may even be subpoenaed to appear at the hearing. If this happens we know you will respond honestly and responsibly.
>
> We will keep you advised of further events as they occur in this situation.

Gottlieb testified that he and Forshee felt that "we should communicate something to the employees about what the hearings were all about and what was going to be done and what the charges were basically." Either Forshee or Respondent's labor counsel drafted the letter. Gottlieb said that the reference to the understanding of employees as to the significance of the cards was based on statements made to him by employees during the campaign; he was evasive and uncertain on this matter under further examination, and finally conceded that the idea for the letter came from Forshee.

Respondent's brief states, "The purpose of the letter, taken on its face, is three-fold: (1) to bring the employees up to date on N.L.R.B. proceedings, and to advise them of the issues; (2) to indicate that they might be required to testify; and (3) to request that they testify 'honestly and responsibly.' " Counsel neglects to note a fourth purpose, plainly the central one: to notify the would-be witnesses

that "We think that if you signed the Union Authorization Card you were only asking for an election, with the right to vote YES or NO UNION. I am sure that you did not expect a Union without an election to determine your choice."

In *N.L.R.B.* v. *Gissel Packing Co.*, 395 U. S. 575, 601-610, the Supreme Court approved the Board doctrine that authorization cards would be considered valid indicators of union support for purposes of issuing a bargaining order unless the authorizing language of the card was "deliberately canceled" by a solicitor who represented to a card-signer that the purpose of the card was solely for an election. The June 28 letter does not expressly carry the employees that far; it speaks of their intent, and not specifically of representations made to them. But it comes pretty close to the *Gissel* exception; it would take an employee of no great wit to translate Gottlieb's expression of confidence that the card-signer "did not expect a Union without an election" into testimony that he was led into that expectation by the solicitor.

Purpose (1) given by Respondent, above, was a marginally plausible reason for sending a letter to the employees about the upcoming proceeding, although it is thin; since nothing immediately hinged on the trial, such as the deferral of a wage increase, there was certainly no pressing reason to send any kind of informational letter. But there appears to have been absolutely no legitimate purpose served by the explication of what Respondent believed the employees were thinking in signing the cards.

I can conceive of only an illicit purpose—to plant a seed in the minds of employee-witnesses as to the character of the testimony which they were expected to give under Respondent's watchful eye at the hearing. The employee is entreated to testify not only "honestly," but also "responsibly." The last is an interesting choice of words, coming as

it does in the context of references to subjects meaningful to an employee's livelihood: a recent wage increase; termination; and employee "needs and desires." It is also of interest that on the very next day, June 29, Gottlieb sent yet another letter to the hourly employees announcing another general wage increase of 25 cents per hour. General Counsel points out that Respondent did not explain at hearing the coincidental timing of the two letters, and persuasively argues that "the implication that the two letters were intended to be linked together is supported by the fact that the 1978 wage increase was not to become effective until after the summer shutdown, rather than at the time of the June 29 wage increase announcement."

In *Gissel Packing,* 395 U. S. at p. 608, the Court observed that "employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of §8 (a)(1)." I think that Respondent intended by the June 28 letter to quicken that probability, relying for coercive effect on its prior unfair practices; the contextual suggestion of the letter itself; the clear import, most likely apparent to employees, of the reason for the letter in the first place; and the backup impact of the June 29 wage announcement. This deliberate attempt to influence employee testimony was violative of Section 8(a)(1), a conclusion mandated by the Board's recent decision on similar facts in *J. P. Stevens & Co., Inc.,* 244 NLRB No. 82, sl. op. pp. 3-5.

K. The Wage Increase Announcement of June 29, 1978

During the hearing, the complaint was amended to allege that Respondent violated the Act on or about June 29,

1978, "by granting all hourly employees a 25-cent per hour wage increase in order to encourage them not to support the Union."

As stated above, by letter dated June 29, Gottlieb announced a general increase of 25 cents per hour for all hourly employees, to take effect at the end of the vacation shutdown.

Forshee testified to several reasons for this increase. First, he said that the 4 percent increase in September 1977 "had not been successful" and management believed that reversion to the "historical sequence of giving 25¢ each July" was in order. This belief was enforced, as July approached, by an awareness that the employees expected to return tc the system of receiving a July increase. Finally, Respondent realized that the minimum wage would again increase by 25¢ in January 1979. Asked why the early anticipation of the 1979 minimum wage rise, Forshee said, "Well, the main consideration was that we did not know at that point in time what the reaction to the 35¢ an hour increase would have." Gottlieb gave testimony similar to Forshee's, but added other factors—"we were still not getting people" and "we have to keep the people even with inflation."

Forshee's reliance on the fact that the September 1977 4 percent increase "had not been successful" erases history; the intervening 35-cent increase in December was supposed to have cured Miller's September folly. Gottlieb's continued concern with "not getting people" is out of step with Forshee's failure to mention any such circumstance. The increase announced in June 1978, together with the earlier increase effective in January 1978, together with the longevity pay of July 1977, together with the amounts awarded under the 4 percent discretionary increase in September 1977, might have given the hypothetical grade 5 employee of 10 years tenure a raise, within a 1-year period, of about

85 cents an hour, as compared with his prior annual increases of a total of 50 cents from July 1975 to July 1976. I do not believe that this unprecedented magnanimity would have found expression in the absence of the Union. Moreover, the timing of the announcement, so pointedly proximate to the June 28 effort to influence testimony at the hearing, can only be thought to have had an independent purpose of achieving that objective.

I conclude that the grant of the wage increase on June 29, 1978, violated the Act.

II. The Alleged Violations of Section 8(a)(3)

A. The Refusal to Reinstate Nancy McDaniel

On October 25, 1977, employee Nancy McDaniel was discharged for refusing to perform a certain duty. The complaint does not allege that the discharge was violative of Section 8(a)(3). It does claim, however, that Respondent's refusal to reemploy McDaniel the following day, and thereafter, was unlawfully motivated.

As earlier stated, McDaniel was a known supporter of the Union. On October 19, while handbilling at the gate, McDaniel spotted a former employee named Hawley, who appeared to be drunk. Later that evening, she called foreman Delmar Thomas and "discussed Mr. Hawley," to what end the record does not show. On the morning of October 25, Gary Miller called McDaniel into his office and, with Thomas and Pat McKeown present, told her he "wanted me to restrict my union organizing on the outside and he would do what he could to control it on the inside." He then went on to accuse her of calling Thomas and question-

ing "the conduct and ability of a supervisor." McDaniel was told to return to her desk, and she did so.[34]

McKeown, in whose offices McDaniel worked, shortly thereafter told McDaniel to take charge of the switchboard from ten o'clock to noon. She and other clericals had been trained to substitute for the switchboard operator, but she had never previously been ordered to perform the work for as much as two hours. She pointed out to McKeown that she was busy with her normal work, and a heated argument ensued, with McKeown telling her twice to "go on the board or go home." Finally, McDaniel said, "[I]f you are firing me, put it in writing," and McKeown walked away.

One-half hour later, at about 10:30, McKeown called in McDaniel and, telling her she had time to consider the matter, again gave her an ultimatum to work the switchboard or go home. She insisted that "with the shipments I have got to do, I can't go on the board." McKeown said, "Nancy, why do you have to be so damn' hardheaded." McKeown then phoned Miller, and McKeown, McDaniel, and assistant production control manager Deane trooped into Miller's office, where McKeown told her that he had punched her time card and that she was to leave the plant. McDaniel protested the tampering with her time card. Miller then assured her that her card had not been punched and said he wanted her to return to her desk, sit down, and

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[34]The complaint alleges, as a separate violation of Section 8(a)(1), that Miller violated the Act on October 25 by "telling employees that they should restrict their union activities outside the plant." Respondent moves to correct the transcript at p. 1244, line 7, so that "restrict my organizing on the outside" would read "to the outside." My notes show that the transcript is accurate, and the motion is therefore denied. McDaniel's testimony about this incident is uncontradicted and I credit it. The ban on her "union organizing on the outside" was palpably unlawful, and I so find.

not "do any work because you will not be paid for it." McDaniel implied that she would continue to work.

She returned to her desk and resumed her work. At about 11:00 a.m., McKeown called her into his office and gave her a letter with her time card attached, saying, "Nancy, this is the letter that you asked for." The letter read:

> Dear Nancy:
>
> You have failed to accept a legitimate work assignment and have asked to be discharged rather than perform a job for which you are qualified and which you have done in the past.
>
> We are complying with your request and you are hereby discharged. If in the future you decide that you can comply with legitimate work requests, such as working on the switchboard, let us know and we will consider converting the discharge into a suspension.

After reading the letter, McDaniel said that she could not accept it, but that if McKeown would "change it, I will accept it." Her objection to the letter was its claim that she had "asked" to be discharged. She returned to her desk and again started working. Soon thereafter, she took a short break and tried, unsuccessfully, to call the Union office. She then returned to her desk and worked until lunchtime. During lunch, she called a Union organizer, who told her to accept the letter and leave the plant. She went to McKeown, got the letter, and departed. McDaniel denied that she was asked to leave the plant between her original receipt of the letter and her eventual departure.

As a result of McDaniel's refusal to work on the switchboard, employee Linda Cannon, who presumably also had other duties, was required to spend an additional 2 hours

at the job, in addition to the 2 hours she had spent on the board from 8:00 to 10:00 a.m.

The following morning, McDaniel went to the plant and asked to see McKeown. She was eventually ushered into the personnel office, where McKeown, Miller, and Deane were present. McDaniel handed McKeown the following letter:

> Dear Pat:
>
> RE: Your letter dated October 25, 1977.
>
> I would like to state that I did not ask to be discharged.
>
> Now and in the future I will comply with legitimate work requests, such as working the switchboard. However, I do not feel that I am qualified to run the switchboard for the length of time requested which are busy hours. If you feel I am qualified I will to the best of my ability operate the switchboard.

She stated that she wished to return to work. Miller said, "Nancy, you do understand we want you to come back to work and do your work and to relieve the switchboard when necessary." After some discussion about the first paragraph of her letter, according to McDaniel, Miller repeated that "[w]e want you to come back to work." He told her, however, that he would call her at home the next day. She said that she would be out on personal business on that day, October 27, and Miller then said she would be called on Friday. In fact, however, McKeown called on Thursday evening and said that Respondent had decided not to take her back, also informing her that she would receive a letter of explanation.

By certified mail, McDaniel received the following message from McKeown:

Dear Nancy:

This is to advise that after review of the entire incident of Tuesday, October 25, it will be impossible to continue your employment with Gordonsville Industries. Your actions after being advised of your discharge preclude the possibility of converting your discharge into a suspension.

McKeown presented the primary testimony for Respondent on the events giving rise to the decision to leave McDaniel unemployed. He said that when he presented the discharge letter to her at 11:00 a.m. on October 25, she became "rather loud," saying that the letter was not properly phrased and she would not sign or accept it. McKeown said she was told that she did not have to sign it, that she was terminated, and she should leave. Instead, she said she was returning to her desk to work. McKeown called after her, saying that she should leave the plant. When McDaniel sat down at her desk and started "shuffling papers," McKeown consulted Miller and asked that she be removed. Miller said that he would see if he could get a warrant.

Assistant manager Deane, a convincing witness, testified that during the lunch period on October 25, McKeown told him that McDaniel had refused the letter and "had refused to leave the plant," and that a warrant had been issued to have her removed from the premises. He further testified that when McDaniel sought reinstatement the next day, he and McKeown told Miller that they thought she should not be allowed to return, since her refusal to leave had created a disruptive "atmosphere . . . even to the point where law enforcement officers had to be summoned to have her removed." Miller "felt a little bit both ways, but he really hadn't decided."

Tom Forshee testified that he was in Louisville when he was informed of McDaniel's refusal to perform switchboard work. He thought that she should be discharged, but, recognizing the "legal overtones," recomended that Miller contact Respondent's labor counsel. The record shows that the October 25 letter was prepared by counsel. When Forshee, who thereafter came to the plant, was informed about McDaniel's request for reinstatement, he discussed the matter with McKeown and Miller. McKeown took the position that McDaniel should not be reinstated; Miller was unsure, one reason being his concern about "a potential unfair labor practice charge." Forshee supported McKeown because of McDaniel's "very obvious insubordination and disruptive influence within the office area and secondly a refusal to leave the premises after being advised of the termination." He conveyed this opinion by telephone to president Gottlieb, who concurred.

The issue presented is a narrow one: did Respondent, after lawfully discharging McDaniel on October 25, violate the Act by taking her Union affiliation into account in considering whether to accept her application for reinstatement?

General Counsel makes an unusual argument. He concedes that Respondent "had absolute justification for unconditionally terminating" McDaniel as of the time she received the discharge letter at 11:00 a.m. on October 25. But, General Counsel argues, because of her known Union activity and the legal implications of a discharge, Respondent "extended a qualified letter to her," which stated that it would "consider" converting the discharge into a suspension should she declare that she would comply with future legitimate work assignments; according to General Counsel, "the question of her eventual reinstatement was *from this point* indelibly cast in terms of her union membership and activity" (emphasis in original). Thereafter,

when Forshee made the ultimate decision against reinstatement, it was freighted with union animus. In other words, at the time of discharge, McDaniel's association with the Union worked in her behalf; at the time of the refusal to reinstate her, 3 days later, it worked against her.

The claim that discipline invoked against union supporters in the course of a campaign was discriminatory can often be difficult to resolve, especially where the employee's union support was notorious. The problem is that management is dealing with a known timebomb. Sometimes it will choose deliberately to detonate it, regardless of the legal consequences; sometimes it will approach with great caution; in either case, the employer's cognition of the potential unfair labor practice charge, as well as the benefits to be reaped by successfully punishing a union activist, introduce obscuring artificial constraints and considerations into the decision. The problem is complicated here by the presence of Forshee, hired to manage the antiunion campaign. *Every* decision made by him was made with an eye to the legal consequences and, therefore, to the union activity of Respondent's employees; this, however, could be good or bad for the employee.

It appears to me that the letter of discharge, holding out hope of reinstatement, was prompted by caution, and General Counsel agrees. As his brief states, Respondent "had every right to fire her, unconditionally, on October 25." The decision to tell McDaniel that it would "consider" converting the discharge into a suspension upon her promise that she would comply with future work assignments was a limb upon which Respondent did not have to climb, and I think that if McDaniel had accepted the discharge letter quietly and made the required promise unconditionally the following day, a decision for Forshee to refuse to reinstate her might well have been viewed as an overzealous exercise of his appointed function to run an effective antiunion

campagn. But McDaniel chose not to follow such a course of action.

General Counsel's threshold position is that McDaniel engaged in no conduct at or after the time when she was first handed the discharge letter which would have made her claim to reinstatement more tenuous. But Respondent argues that after receiving the 11:00 a.m. discharge letter, McDaniel made herself even more *persona non grata,* both by refusing to accept that letter and refusing to leave the office as instructed by McKeown, and that such behavior justifiably obliterated any consideration for reinstatement held out by the letter. Here we have a testimonial conflict, which I resolve in Respondent's favor.

McDaniel testified that McKeown did not tell her to leave the premises after she refused to accept the letter. McKeown, however, said that he twice told her to leave the office after her refusal, and that she instead defied his order by returning to work. She sat at her desk and, in McKeown's word, began "shuffling" papers. McKeown then asked Miller to have her removed, and Miller said he would try to get a warrant.

If Respondent did attempt to have McDaniel removed by the police, that would obviously tend to support the testimony that McDaniel had refused to leave the premises. Perhaps because it was a detail lost in the sea of details, Respondent did not call Miller to testify that he had summoned the police, but Renee Atkins, a co-worker of McDaniel's who appeared for Respondent, testified that she saw "officers of the law" on the premises on October 25. Furthermore, McDaniel, asked if she knew anything about a warrant being sworn out to remove her from the plant, said, "I do now. I did not know at the time, no. I never knew until the 28th day of November." The record does not show what brought the warrant to her attention on November 28, but it was obviously in a context which could

not be said to be related to the unfair labor practice case, since the charge relating to McDaniel was not filed until December 5.

I am inclined to believe that the police were indeed called, as a result of McDaniel's refusal to leave after being handed the discharge letter. That McKeown would have told her to leave would hardly be a surprising course for him to take; McDaniel testified that twice on October 25 *before* she was fired, McKeown, had told her to "work or go home;" he would very likely have told her to "go home" after discharging her.[35]

This post-11:00 a.m. insubordination, coupled with McDaniel's demand for a modification of the wording of the discharge letter, and on the heels of the work assignment refusal which legitimately led to that letter, would be patent and unassailable justification for an employer to

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[35]McKeown's version is also confirmed by the testimony of Renee Atkins. She testified that she heard McDaniel say to McKeown, after receiving the letter, "[Y]ou can't make me leave . . . I refuse to leave." She also, as stated, subsequently saw "officers of the law on the premises." I found Atkins to be a credible witness despite her characterization of McKeown's voice as "very low" during the argument with McDaniel, contrary to his own testimony that he was "loud"; Atkins conceded that the "details aren't too clear." She may indeed only have been comparing the voices of the two; she referred to McDaniel's tone of voice as being "so loud." Atkins was no longer employed by Respondent at the time of hearing (she had worked there for less than a year) and had no apparent reason for fabricating testimony.

The testimony of Sally Perkins, a "very close friend" and co-worker of McDaniels, was not that helpful to General Counsel. She apparently was not in a position to hear the 11:00 a.m. termination interview, since she testified that after McDaniel left McKeown's office, McDaniel felt it necessary to report the content of the exchange to Perkins: "[S]he says you won't believe what I just got and I said what. She said I just got a letter saying that I asked to be fired."

reach a negative result in deliberating its offer to "consider" converting the discharge into a lesser penalty. It is true that Respondent equivocated for a while, even after the second act of insubordinaton. The reason is plain enough; Miller's concern about an unfair labor practice charge being filed. But I believe that the testimony of McKeown and Deane that they thought McDaniel's entire course of conduct should preclude the proffered consideration, and Forshee's decision to accept that advice, rests on reasoning much too substantial for the Board to disregard.[36]

In my view, had McDaniel behaved with some realistic sense of her jeopardy after being handed the discharge letter at 11:00 a.m., she might have obviated a permanent loss of employment.[37] But she continued to engage in the very pattern of behavior which caused her downfall in the first place, and I cannot say that Respondent's decision that her "actions after being advised of [her] discharge preclude the possibility of converting [her] discharge into a suspension" would have been different if another, non-union, employee had been involved; indeed, it appears that the delay in reaching that decision was occasioned only by the fear of consequences stemming from McDaniel's support for the Union. I recommend that the allegation as to McDaniel's failure to obtain reinstatement be dismissed.

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[36]I note that even McDaniel's October 26 application for reinstatement was somewhat grudging and not calculated to win Respondent's heart: "However, I do not feel that I am qualified to run the switchboard for the length of time requested which are busy hours."

[37]There is nothing about McDaniel's record which suggests that Respondent was parting with an employee whose performance was highly prized. An employee review dated July 18, 1977, gave her a score of 61 out of 100 points, with McKeown commenting, "Attitude & attendance both below standard, but knows job and does correctly."

B. The Discharge of Stephen Bolding

The complaint alleges that Stephen Bolding was discriminatorily discharged on November 8, 1977.

Bolding was hired as a mechanic in June 1976. Personnel records in evidence show that his immediate supervisor thought highly of him and his potential. Bolding, as previously noted, was a noted and active Union adherent. On October 21, he wrote a letter to Gary Miller defending the Union against an allegation made by Miller in an earlier distribution to employees, and clearly identified himself as a Union supporter, a fact already made apparent by his frequent handbilling.

While entering the plant on the morning of November 8, Bolding saw some anti-union material posted at two locations, and he removed several posters from the wall. James McDaniel informed him that employee Ed Shelton was putting up the posters throughout the plant. Bolding then ran into foreman Brown and employee Shelton, and asked the latter whether he was responsible for the posters. When Shelton said he was, Bolding, as he testified, "took him by the shoulders and shook him a little bit and asked him to quit putting them up and informed him that as fast as he put them up, James and I would take them down." He stated that he was "almost laughing" as he did this, and the others responded in like vein.[38]

Intending to proceed to work at another building, Bolding was signing out an employee register at about 8:30 a.m. when he noticed maintenance employee Russell Wingfield nearby. According to Bolding, he "grabbed [Wingfield] by the shoulders and asked him who was putting up the

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[38]Respondent's brief states that Shelton "weighs approximately 300 pounds." While this is *dehors* the record evidence, it would suggest that Bolding was in a whimsical mood, at least at the time he encountered Shelton.

anti-union literature and before he could answer, I said I know who it is. It is Ed Shelton. And he confirmed it." Bolding says that he then discussed with Wingfield whether he was eligible to vote in the election, and that there was some further conversation about one of Bolding's duties which Wingfield had assumed during Bolding's vacation. Bolding testified that when he grabbed Wingfield, he gave him three or four fast but gentle shakes, and his courtroom reconstruction of the physical action was mild-mannered and friendly.[39] He further stated that employees customarily teased Wingfield, and that their relationship was "very cordial."

Bolding then went about his work. Around 12:15, he was called to Miller's office. In the presence of plant engineer Ozbey, Miller, referring to a piece of paper, asked Bolding if it was true that he had assaulted and threatened Wingfield. When Bolding denied any such conduct, Miller said he had a witness, but refused to disclose the name of the witness and he also refused Bolding's request to "see Mr. Wingfield." Miller asked Bolding to resign. When Bolding said he would not, Miller discharged him. Bolding asked for a letter of discharge.

While Bolding was collecting his personal belongings, foreman Brown handed him a letter from Miller which briefly stated that he was being discharged and that "[t]he reasons for this termination have been reviewed with you." Wanting something more explicit, Bolding returned to Miller's office. Miller told him that the reasons for termination had been discussed and that he should "leave the property." As he left, foreman Brown offered to give him a good reference.

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[39]Bolding is a tall man in his 20's; Wingfield is a smaller man, in his 60's.

Later that day, Bolding saw employee Kenneth Decatur. Bolding asked if Decatur, the only other employee who worked in the area in which he had encountered Wingfield, knew who the company witness was. Decatur said "it was him," but "he had told Gary Miller nothing that could have hurt me in any way and that he was sorry."

Russell Wingfield gave a markedly different account of the events of November 8. He said that Bolding, looking "kind of red in the face," came up to him, grabbed him by his shirt collar, and asked him if he had torn down any signs, to which Wingfield replied, "No, I don't tear any down and I don't put any up." That, according to Wingfield, was the end of the conversation. He said he was not frightened by the physical gesture. About 30 minutes later, said Wingfield, Bolding approached him again and said, "Somebody will get hurt and I mean hurt."

Wingfield contacted his superior, Garland Marks, who told him to write a note to Miller and to Ozbey. A copy of the Ozbey note in evidence reads:

> I was next to Boiler door as you go to office, and Stephen Bolding grab me in the collar, said did you put that sign up.[40] I said I do not put signs up, and I do not take any down. When he came back he told me that somebody was going to get hurt, and I mean hurt.

Wingfield testified that he carried the note to Miller, who read it, simply asked "Is that what happened?," and received an affirmative reply. Wingfield then returned to his post. He confirmed that he had previously enjoyed a good relationship with Bolding, and ultimately agreed that other employees had on occasion physically teased him,

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[40]At the hearing, Wingfield stated that he was in error here; what he meant was "did you tear that sign down."

although in earlier testimony he had denied that he had ever been touched by employees in the course of horseplay.[41]

Garland Marks, foreman of maintenance and security, testified that Wingfield had told him that Bolding "grabbed him in the collar and shook him" and subsequently threatened that if Wingfield "pulled down another sign something was going to happen to him bad." Wingfield was "almost crying and shaking, and he was upset, real upset." Marks left, after telling Wingfield to report the incident to Ozbey. Marks met Ozbey in the hall, related the story, and then went to Miller's office to repeat it. Tom Forshee was in Miller's office at the time. Marks at some point asked Decatur what had happened; Decatur said he "had seen [Bolding] grab him, he said I didn't know what was going on," but he "thought they was playing or something of the sort."

Kenneth Decatur testified for General Counsel that he was present on November 8 in the area with Bolding and Wingfield; he remembered Bolding saying something about taking a sign down; he recalled Bolding being "close to" Wingfield's "shoulder," but did not recall any contact in the "shirt collar area;" he seemed sure that Bolding had raised only one arm; and he thought of the incident as "horseplay." About 30 or 45 minutes later, when Decatur saw Wingfield in the security office, Wingfield was "mad" and said that if Bolding "threatened him again and grabbed him in the collar, he was going to hurt him."

Ozbey then called Decatur to a front office to ask what had happened, and he said he considered "it was horseplay." Wingfield was present—he "was hot, Russell was mad."

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[41]His explanation of the discrepancy—that he had thought the earlier questioning related to other horseplay "while this [November 8 incident] was going on"—is, in context, a distortion of the unmistakable general thrust of the prior questions.

When asked by Ozbey if he saw Bolding "threaten Russell or hurt him and grab him," Decatur said he had not. An hour or so later, Decatur was called to Miller's office and was asked about the incident; Decatur "told him as close as I can remember the same thing as I told Mr. Ozbey." He also wrote out for Miller the following statement:

> I saw Steven & Russell doing what I thought was playing. Steven reached for Russell somewhere near collar or upen [sic] chest. I didn't see contact, and passed it off for a joke.

The area was noisy, Decatur was involved in running boiler samples, and he heard little or nothing of what was said during the encounter between Bolding and Wingfield.

Two statements composed by Bolding on November 8, the day of discharge, subsequently given to the Union, are at some variance with his testimony at trial. While Bolding testified that he had asked Wingfield who had put up the antiunion posters and then had himself supplied the answer before Wingfield could respond, one of the statements instead says that Bolding had asked Wingfield if *he* had been responsible, to which Wingfield "said, 'No!' that Ed Shelton had put it up." Although Bolding testified that thereafter he had calmly raised with Wingfield the subjects of Wingfield's eligibility to vote in the election and whether Wingfield had been compensated for recently performing one of Bolding's duties, the statement does not refer to the latter topic of conversation.

Bolding's November 8 account of the discharge interview has Miller saying, "You know we've had a car get acid on it and sugar put into a gas tank while it was in the parking lot," but Bolding did not mention this remark in his testimony. Of more potential significance is the fact that the November 8 statement did not mention that Bolding asked for, and was denied, an opportunity to talk to Wingfield.

But moderating these variances is some evidence that Bolding's inconsistencies may not indicate fabrication. Although Bolding's November 8 statement refers to Miller saying to Bolding "I have a witness," it omits stating that Bolding asked for, and was refused, the name of the witness. Nonetheless, at the hearing Ozbey supported Bolding's testimony that this in fact occurred.

Tom Forshee testified that the decision to fire Bolding was his. He was in Miller's office when Marks, "very upset," reported the Wingfield incident. He heard the same story from Ozbey. He asked Miller what the past practice had been in dealing with such behavior, and was told that similar miscreants had been terminated. He saw the signed statements of Wingfield and Decatur. He decided that Bolding should be discharged because:

> [I]t had got to the point where enough was enough. It was just an increasing type of activity of this nature that had reached a proportion where it shouldn't have been tolerated further.

The foregoing reference is to a series of events subsequent to the Union demand, and partially documented in the record, in which there had been considerable apparent vandalism, theft, and sabotage involving company machinery and property, including throwing of acid, etc.; the vandalism of a half-dozen employee automobiles; and the mistreatment of two employees, one of whom had requested that she be reassigned from a shift because of "the harassment that she was receiving from pro-union supporters."

Forshee did not meet with Wingfield, Bolding, or Decatur before deciding to fire Bolding. He testified that the decision was made before Miller met with Bolding, and the "purpose of the meeting between Miller and Bolding [was] to advise him of his termination." He also said that the information given to Marks and Ozbey by Decatur appeared

to be inconsistent with the written statement made by Decatur, but he weighed this in the light of the fact that Decatur had "made the comment to Mr. Miller I don't want to get anyone in trouble. I don't want to get anyone fired."

The evidence against Respondent on this count includes no smoking pistol; nonetheless, I am convinced that had it not been for Bolding's union activities, and, as well, the union activity in general, Bolding would very probably not have been discharged.

Bolding's case, like McDaniel's, is complicated by the constraining factor that the discipline was being administered to a known Union supporter, and is aggravated by the fact that the decision was made by outsider Forshee, without any recommendations even being made, according to their testimony, by Miller, Ozbey, and Marks. Although Forshee said that his duties included reviewing all proposed discipline and discharges to assure consistency and propriety, he could recall no instances other than the Bolding and McDaniel terminations where he made "the actual decision." Thus, the question of whether Bolding should be fired was bucked up to Forshee, a stranger to plant disciplinary practices and to the persons involved, and introduced an element of remoteness not normally present in the plant disciplinary process.

Forshee openly conceded that it had been "communicated [to him] relatively early that Bolding was involved" in the campaign. The question presented is whether Bolding's involvement, or the campaign itself, resulted in denial to Bolding of the kind of consideration that non-union employees, in a non-union setting, might have received. I think the answer is in the affirmative.

Viewed objectively, there was rather plainly a rush to judgment in the decision to terminate Bolding. Documents presented from Respondent's files relating to discipline indicate that supervisors making discharge and discipline

decisions in the past normally had interviewed the participants in alleged misconduct.[42] It seems virtually certain that, in a less controversial setting, Bolding would have received similar treatment. The fact is that *not one* member of management asked Bolding for his version of the November 8 events. The very first time Bolding was confronted was some 4 hours after his encounter with Wingfield, when Miller met with him only, as Forshee put it, "to advise him of his termination."

The disciplinary files in evidence reflect a more deliberate approach to other instances of alleged misconduct, showing that Respondent's supervisors normally considered all factors, including the record and the potential of the charged employee. It seems clear that, in ordinary circumstances, Bolding would have received more equitable treatment and consideration than that afforded him on November 8. Bolding is an unusually pleasant, cleancut, and intelligent young man. His employee evaluations were excellent. Plant engineer Ozbey called him a "very ambitious person." Foreman Marks said that he was "surprised . . . so bad" by Wingfield's report because Bolding was the "[n]icest mannered man you want to see. I didn't ever have a problem with him until this problem right here." Obviously a valuable employee, Bolding nonetheless received extremely short shrift in the "investigation" of his alleged offense, not even being afforded the opportunity of presenting to management his version of the issue, in obvious departure from Respondent's customary procedure.

The desire not to investigate is particularly noticeable because of the circumstances of the case. The note written by Wingfield to Miller, describing the events, was stark and shorn of detail, but, according to Wingfield, when Miller

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[42]See General Counsel Exhibits 272, 273, 274, and Respondent's Exhibit 20.

called him in for an interview, all that Miller asked, referring to the note, was "Is that what happened?" Had Miller exhibited more interest in the incident, he could have learned from Wingfield that, as the latter testified at the hearing, he had not been frightened by the physical touching (if that had been all, "I would not have said anything"), he did not view the statement about someone getting "hurt" as being directed at him, and he had gotten along "fine" with Bolding prior to this incident.[43]

Furthermore, Forshee's haste to render an adverse judgment against Bolding led him to disregard a piece of evidence which, under ordinary circumstances, would most likely have provoked more inquiry. As set out, Forshee, who made the decision, did not personally interview Wingfield, Decatur, or Bolding. His knowledge of the events was, he testified, based on the second-hand accounts given him by Marks and Ozbey, neither of whom had interviewed Bolding, and on the statements written by Wingfield and

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[43]Resolution of the allegation presented does not require a decision as to precisely what occurred between Bolding and Wingfield. As discussed above, Wingfield testified that Bolding grabbed him by the collar and later returned to speak of someone getting "hurt." Bolding testified, on the other hand, that he grabbed Wingfield in a jocular manner and did not say anything to him subsequently. While Bolding was an extremely impressive individual, there is no basis in the record for believing that Wingfield would have fabricated or exaggerated his version, although I do note that Wingfield, on the payroll since January 1961, had been a foreman at one time. I have no doubt that Wingfield was truly provoked by Bolding; Decatur, General Counsel's witness, said that Wingfield was "hot" and "mad" while the matter was being reported to management. Nonetheless, Wingfield's genuine ire may well have been a misguided overreaction to some clumsy, innocent approaches made by Bolding. I reject out of hand that a man like Bolding offered or intended to offer any serious threat or harm to the older, smaller, Wingfield, a man who apparently served as a butt of employee practical joking.

Decatur. But Decatur's statement raised a red flag: it said that Decatur thought Wingfield and Bolding were "playing," and Decatur had "passed it off for a joke." At the hearing, Forshee stated that this stance was inconsistent with what Decatur had told Marks and Ozbey, and that he had attributed this change of position to Decatur's statement to Miller that he did not "want to get anyone in trouble."

Asked at the hearing whether he had made such a remark, Decatur said, "I don't know if I made that statement or not . . . . I don't remember making that statement to Mr. Miller." But Decatur also testified that he told Miller, and Miller was not called upon to deny it, that he thought the contact had just been "horseplay." There is, furthermore, a serious question whether Forshee could have relied on an allegedly different version by Decatur which was purportedly relayed to Forshee by Marks; although Marks gave inconsistent testimony about whether he spoke to Decatur before or after he gave a report of the incident to Miller and Forshee, at one point he testified clearly that he did not interview Decatur until he had returned from reporting to the two managers.[44] Moreover, Marks' testimony as to what Decatur did tell him is consistent with Decatur's version. Marks said that Decatur told him that he "thought they were playing."

Ozbey, the other conduit from Decatur on which Forshee purportedly relied, testified that when he interviewed Decatur, the latter "really impressed me that it was serious situation with Russell Wingfield and Steve Bolding at the time." Decatur testified, however, that he had told Ozbey that it seemed like "horseplay" to him. It would appear to

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[44] "Q. So you didn't talk to Decatur until after you came back from talking to Mr. Miller?

A. No."

me that Decatur was giving the more likely account since, at Ozbey's instance, he promptly wrote up the memorandum set out above, stating that he thought it was "playing" and "a joke."[45] I cannot conceive that Decatur would have told Ozbey that it seemed a "serious" encounter to him and then, directed by Ozbey to memorialize his statement, so completely have reversed himself. Furthermore, Ozbey could not recall giving a report to Forshee about the Bolding incident on November 8.

Thus, to the extent that Forshee attempted to brush aside the discomfiting Decatur memorandum by relying on purportedly contrary versions given by Decatur to Marks and Ozbey and relayed to Forshee, the effort meets considerable obstacles. In any event, the very existence of such a memorandum, in a situation in which nuance and detail so obviously could be of significance, naturally called out for further inquiry, but none was made. It is striking to read Forshee's testimony that, when Marks first told him and Miller of the incident, he directed Marks to return to the participants "and develop as much information as he could relative to the incident," and then to realize that no one even spoke to Bolding or sought to more definitively clarify Decatur's evidence. It is difficult, on these facts, to avoid the inference that Forshee was donning blinders, hoping that he could substantiate a case against Bolding rather than afford him the kind of consideration which had obtained in the plant prior thereto. "A failure to investigate the incidents upon which the employer relies as grounds for discharge may reflect an employer's discriminatory motivation." *W. W. Grainger, Inc.* v. *N.L.R.B.*, 582

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[45]Although Wingfield believed that it was Marks who told him to write out a statement for Miller, Marks said he had not given such an instruction. I believe that it was Ozbey who told both Wingfield and Decatur to prepare the statements, as Ozbey indicated at the hearing.

F. 2d 1118, 1121 (C.A. 7), citing *N.L.R.B.* v. *Gogin*, 575 F. 2d 596, 602 (C.A. 7).

Not only do the disciplinary files in evidence bespeak a brand of procedural fairness not applied to Bolding, but they also suggest that the conduct of which Bolding was found guilty would not usually, taking all circumstances into account, have resulted in permanent termination. Bolding was thought to have grabbed another employee by the collar and later uttered an unspecified threat against "somebody." The records admitted at hearing disclose no precisely parallel situation. While it seems clear that Respondent has consistently cracked down on "fighting," a "grab" is not necessarily a fight; as Marks, the foreman of maintenance and security, testified, he does not bother to file reports "lots of times, you take a couple of men out there throwing an arm or a shoulder or just grabbing each other, petty stuff."

The pattern of discipline revealed by the evidence displays a general flexibility over the years even as to employees who had participated in a fight. Thus, in March 1970, employee Bell was fired for fighting, with the proviso that Respondent "would consider for reemployment at some future date;" Bell was rehired in July, the supervisor noting that he "had a long talk with this man and he is ready to come back to work and do a good job for us." Bolding was given no second chance. In 1972, employee Riner, in a prolonged incident which moved from room to room, "grabbed David May at the collar of his shirt," "pushed D. May against the table," and "struck D. May in the mouth." Riner was offered a job on the night shift "because of his long service instead of firing him." While other employees have been flatly terminated for fighting, either the incident has been egregious or reference has been made to aggravating circumstances ("her lateness and absenteeism is a problem;" "has been a troublemaker in the

past;" employee "appeared to be drunk on the job"). Against this background, it is difficult to believe that an obviously useful and respected employee like Bolding would have been terminated permanently in other circumstances in which Respondent in good faith believed him guilty of the charges made by Wingfield. The injudicious haste with which Bolding was expelled suggests an ulterior motive.

That even Forshee thought that the assertions made by Wingfield might not ordinarily be enough is indicated by his testimony that discharge was dictated because:

> [I]t had got to the point where enough was enough. It was just an increasing type of activity of this nature that had reached a proportion where it shouldn't have been tolerated further.

Forshee referred here to the evidence of harassment and vandalism by unknown persons whom he assumed to be supporters of the Union. His statement says to me that Bolding was terminated not so much for abstractly improper employee behavior as for conduct that represented the "type of activity" which Forshee had thus far been helpless to retaliate against. The implication is that Forshee needed a target for reprisal and that if the contretemps between Bolding and Wingfield had concerned some private matter, Bolding would have received a different sort of consideration. In my view, a discharge decision so grounded, without more, would be violative, since it would inject into the deliberation about the liability and punishment of a union supporter the suspected sins of other union supporters.

Aside from that theory of the case, however, which General Counsel does not advance, I am persuaded that the evidence reasonably supports the inference that Respondent was so anxious to find Bolding guilty of the conduct charged against him that, contrary to its routine practice, it

strained to avoid any possibility of exculpating him or reducing his punishment. I can only conclude that it did so because of what appeared to be a fortunate opportunity to eliminate a front-line Union adherent. I further believe that had Respondent not perceived Bolding as an enemy, rather than a valued employee, he likely would be employed by Respondent today. This is "discrimination . . . to . . . discourage membership" in a union, as proscribed by Section 8(a)(3).

IV. The Alleged Violation of Section 8(a)(5)

The complaint alleges that by its refusal to honor the Union's September 23 demand for recognition, Respondent violated Section 8(a)(5), and that, because Respondent's commission of unfair labor practices rendered unlikely the possibility of holding a fair election, the appropriate remedy for those unfair labor practices is an order which requires Respondent to bargain with the Union. *N.L.R.B.* v. *Gissel Packing Co., supra,* 395 U. S. at pp. 610-613, authorizes the entry of such an order in appropriate circumstances.

A. The Composition of the Unit; the Challenged Ballots

Prerequisite to issuance of a bargaining order is a finding that the Union represented a majority of employees in an appropriate bargaining unit "at one point," *Gissel, supra,* 395 U. S. at 614.[46] The answer agrees with the complaint that an appropriate unit consists of:

> All production and maintenance employees employed by Respondent at its Gordonsville, Virginia, location,

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[46]The Board has so construed *Gissel* and the Act. *United Dairy Farmers Cooperative Association,* 242 NLRB No. 179.

but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

Whether, as the complaint also asserts, the Union has, since September 23, 1977, by virtue of authorization cards secured by the Union from employees, been designated by a majority of employees in that unit as their collective-bargaining representative, is seriously disputed by Respondent.

The first dimension to be determined is the size of the appropriate bargaining unit at relevant times. General Counsel considers September 26 as the first "critical date," characterizing it as the day on which Respondent refused to agree to recognize the Union. The letter refusing recognition was dated September 27; nonetheless, it would appear, from *Trading Port, Inc.*, 219 NLRB 298, 301, that a bargaining obligation could begin as of September 26, when the Union had made its demand and when Respondent, by its employee survey, "embarked on a clear course of unlawful conduct." See *First Lakewood Associates*, 231 NLRB 463, 464, 475. It is further appropriate to consider the Union's demand and the Respondent's refusal as "continuing," thus permitting consideration of those authorization cards signed on and after September 26 (with, of course, adjustment for changes in the composition of the unit), *Schwab Foods, Inc.*, 223 NLRB 394, 413. Because of limitations of the evidence presented, General Counsel, "for ease of proof," would terminate the continuance of the demand on October 16.

The parties have stipulated to several lists of employees who were concededly in the appropriate unit from September 19 to October 16, totaling 315 on September 26[47] and

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[47]298 as shown on G. C. Exh. 287 plus 17 (including William Carter, see note at bottom of G. C. Exh. 288) as derived from G. C. Exh. 288.

declining to 305 by October 16. The only other potentially includable employees for this period are 18 employees who were on the payroll in the relevant period and thereafter, who voted in the December 6 election, but whose eligibility as members of the bargaining unit is controverted.

As indicated light-years earlier in this Decision, the Regional Director consolidated for hearing with these complaint cases certain issues arising out of the election, including the resolution of challenges to votes cast in the December election by 25 persons. One of those votes was cast by Stephen Bolding; since I have concluded that he was unlawfully discharged, his ballot should be opened and counted. *Atlantic Foundry and Pattern Corp.*, 192 NLRB 745, 749. At the hearing, the parties agreed that 6 of the challenges, including that made to the ballot cast by Nancy McDaniel, should be sustained. That leaves for determination the eligibility of 18 voters. Since all 18 were on the payroll in September and October, their status also affects the size of the bargaining unit at that time. Accordingly, in order to resolve the threshold question of the size of the unit, it seems logical to discuss the challenged ballots at this point.

General Counsel's brief takes the inviting course of disposing of all 18 challenges in a sentence: "For the purposes of argument, General Counsel contends that all those employees whose community of interests was litigated in the Charging Party's challenge case are ineligible." Of course, the status of these 18 individuals, as explained above, is material not only to "the Charging Party's challenge case," but also to the Section 8(a)(5) case. Respondent's brief is almost as succinct on these issues, contending that 15 of the challenges should be overruled, but conceding that 1 challenge, to the ballot of Patricia Hess, is valid. Although Respondent's brief fails to state a position on the

ballots of Marilyn Dowdy and Regina Meeks, I will assume that it supports opening and counting them.

Charging Party, which filed the challenges to 17 of the 18 remaining ballots,[48] has addressed the issues at some length on brief. The considerable amount of testimony taken on the subject of unit placement will, regrettably, require substantial summarization.

1. Ray Carpenter, Jr.

Ray Carpenter, Jr., has been employed by Respondent since 1961, in later years as an expert mechanic. As a result of the mutual interest by Respondent and the local school system in such a project, a vocational education program for industrial knitting was established, by agreement between the system and Respondent, for the school year beginning late August 1977, and Carpenter was assigned to teach the course. He signed a standard teaching contract with the system in the amount of $10,287 for a 10-month period and, around the same time, reached agreement with Respondent for continued partial employment with it at the rate of $3,713 annually.

Carpenter and Respondent reached an understanding that during the school year, he is required to spend at least 10 hours per month working for Respondent, and to work full-time for Respondent during the school summer vacation. Carpenter testified that during the winter of 1977-1978, he spent his monthly time at Respondent's facility primarily in consulting about items relating to his school work, but also in trouble-shooting machinery problems. During the summer of 1978, he was, as agreed, at the plant for 40 hours a week on what appears to have been a free-lancing basis which allowed his skills to be used to their

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[48]The other challenge was filed by the Board's agent because the employee's name was not on the eligibility list.

best advantage. His seniority, insurance entitlements, and other employment benefits were maintained throughout, and he has continued to appear on Respondent's payroll.

Carpenter's ties to the bargaining unit are, I believe, sufficiently strong to warrant his inclusion. During the winter, he consistently spends at least 10 hours a month at the plant; during the summer months, he is present at the plant for 40 hours a week. Despite his somewhat unusual status, I would conclude that Carpenter, a veteran employee, has maintained a continuing and on-going relationship with the bargaining unit and has a sufficient community of interests and identification with the other production employees to share in deciding whether or not they should be represented by a union. He is at least, as Respondent argues, "a regular seasonal employee with an expectation of continued employment." See *Trans World Airlines, Inc.*, 211 NLRB 733, 734-735.[49]

I do not find any substantial basis for excluding Carpenter on the alternatively proffered ground that he "has the authority to effectively recommend the hiring of production employees." His testimony indicates that Respondent has agreed to give a trial job to any of Carpenter's students who apply for work, and, at best, he has volunteered advice to Respondent about the kind of work for which a student would be best suited.

I would, therefore, consider Carpenter to be a unit employee both in September and December 1977. His ballot should be opened and counted.

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[49] I do not doubt that if the arrangement with the school system should come to an end, Carpenter would return to full-time employment with Respondent.

2. Alton Thomas

Alton Thomas, who was a "mechanic supervisor" until 1973, was assigned then as an "R & D Mechanic"[50] to the research and development area, at an increase in pay. He works there now under Jim Spencer, who is "in charge of it," and with two mechanics named Carpenter and Peregoy (the latter still learning the trade).

Thomas' testimony shows that he engages in physical labor, setting up new patterns and working out problems in old ones. While he probably gives instructions to Carpenter and Peregoy (his "helpers"), his testimony establishes that Spencer makes the crucial decisions.[51]

Other testimony as to the special status of Thomas—that he is salaried and does not punch the time clock,[52] that he receives an hour for lunch, that he sporadically answers inquiries or receives instruction from his former supervisor in New York when Spencer is absent—does not suffice to establish that he is a statutory supervisor.[53] While the record shows, as Charging Party points out, a substantial disparity between the wages earned by Thomas and Peregoy in 1977 ($15,300 and $7,700),[54] there is simply no basis

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[50]Charging Party Exh. 14.

[51]The fact that Carpenter considers himself "in charge" of Carpenter and Peregoy on the rare occasions that Spencer is not in the plant is of little consequence.

[52]The fact that employees are salaried is not necessarily a material distinction between them and hourly-paid production employees. *Libbey Glass Division, Owens-Illinois, Inc.*, 211 NLRB 939, 940-941.

[53]The testimony discloses that Thomas and Peregoy have only four common hours of working time: Thomas works from 6:00 a.m. to 4:00 p.m., Peregoy from 12:00 p.m. to 10:00 p.m.

[54]Thomas, in 1977, was 42 years old and had worked for Respondent since 1963; Peregoy was 21 years old and had worked for Respondent since 1976.

in the other evidence more directly relating to supervisory authority for a conclusion that Thomas possesses such authority. *Davison-Paxon, A Division of R. H. Macy Co., Inc.*, 180 NLRB 470, 471, n. 4. Similarly, his special status as an expert experimental worker, and the privileges accorded him, are not so striking as to require a conclusion that his community of interests with other employees is negligible.

Accordingly, I would conclude that Thomas should be counted within the bargaining unit for Section 8(a)(5) purposes, and that his ballot should be opened and counted.

3. Ellen Atkins, Annette Rogers, Patricia Hess, and Wanda Fotusky

The unit description agreed upon prior to the election, and echoed in the complaint, specifically excludes "office clerical employees." The disputed placement issues left to be resolved primarily involve Charging Party's contention that the employees should be considered "office clericals" and Respondent's competing claim that they are "plant clericals."

Historically, the Board has taken the position that while "office clericals" should normally be excluded from production units, *Swift & Company*, 119 NLRB 1556, 1558, workers who perform clerical duties in close association with the production process are included in production units, usually under the rubric of "plant clericals." *Goodman Mfg. Co.*, 58 NLRB 531, 533. The Court of Appeals for the Ninth Circuit recently opined, "The line between plant and office clerical is faint; sometimes it disappears." *Pacific Southwest Airlines* v. *N.L.R.B.*, 587 F. 2d 1032, 1041. It might be added, after a review of some of the cases, that the determination is occasionally as much visceral as cerebal, with the guiding criterion, of necessity, being no more

specific than that set out by the Board in *The F. & M. Schaefer Brewing Co.*, 198 NLRB 323, 326: "Clerical employees may be included in a unit of production and maintenance employees where they enjoy interests and working conditions similar to those of production and maintenance employees."[55]

Respondent's facilities consist of 3 plants (Mills A, E, and W); the largest plant, and the one in which all the remaining disputed employees save one are located, is Mill A. Within the four walls of Mill A are located production and maintenance employees and clerical employees, all on ground level with the exception of certain employees officed in a mezzanine-like structure deep within the mill, as hereafter, discussed.

The general offices of the plant are located next to the front entrance of Mill A, although the record says little about them. We do know that the production control offices, in which Nancy McDaniel used to work with 4 other clericals, are situated there; we also know that those 5 employees have been stipulated by the parties to be "office clericals." There is also an "IBM computer room" in Mill A. Gary Miller referred to people "involved in accounting, general administrative functions, data processing, and those people involved in general management." Bolding testified that some 8-10 secretarial workers are located in the front offices. The employees who remain in dispute work in offices and rooms scattered throughout what can be thought of as the production areas of the plants.

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[55]Compare *Pacific Southwest Airlines, supra,* at p. 1040: "In revewing the Board's determination, we focus the issue more precisely by simply asking: Do these employees share a sufficient community of interest with production workers to justify a single unit?"

It is a recurring theme of Charging Party's brief that because the production control clericals are agreed to be office clericals; because there is some occasional contact and similarity in working conditions between these employees and the remaining disputed employees; and because some of the contested employees exercise secretarial or filing skills, the latter should more appropriately be grouped with the excluded production control employees than with the bargaining unit employees. *Boeing Vertol Company,* 233 NLRB No. 126, cited in support, found certain employees to be office, not plant, clericals, but only on a showing that they "share[d] a strong community of interests" with other employees stipulated to be office clericals. Speaking generally, no such "strong" relationship between the production control employees and those hereafter discussed has been demonstrated here.

Certain ingredients predominate in Board decisions finding employees to be plant, rather than office, clericals, despite the existence of factors which might point the other way. The indispensable and conclusive element is that the asserted plant clericals "perform functions closely allied to the production process or to the daily operations of the production facilities at which they work." *Fisher Controls Company,* 192 NLRB 514.

Normally, plant clericals spend all or most of their working time in the plant production area. Normally, they are involved in the production process itself: for example, an employee who works in the production area requisitioning parts needed by production employees is a plant clerical; an employee who fills out forms in the billing department located in the administrative offices is an office clerical. See *Raytee Company,* 228 NLRB 646, 647. The fact that clerical employees exercise secretarial skills and are classified as "secretaries," "stenographers," or "clerk-typists," is no obstacle to finding them to be plant clericals,

given other factors which tie them to the production process and other production employees. *Swift & Company, supra,* 119 NLRB at 1567; *Weyerhaeuser Company,* 173 NLRB 1170, 1171, n. 8. For other cases which have general application to one or more of the employees hereafter discussed, see *Viking of Minneapolis,* 171 NLRB 1155, 1160; *John S. Barnes Corporation,* 180 NLRB 911, 931; *United States Postal Service,* 200 NLRB 1143, 1146-1147; *United Telephone Company of Ohio,* 205 NLRB 664, 665; *AIL, A Division of Cutler-Hammer, Inc.,* 214 NLRB 203, 204, 208; *The Baptist Memorial Hospital,* 225 NLRB 1165, 1167-1168; *C & T Manufacturing Company,* 233 NLRB 1430, 1439.

The contested employees described hereafter received the same fringe benefits and were on the same pay schedule as the production employees; as far as the record shows, the only distinctive working condition for some of them, as opposed to the production employees, involved their lunch periods and rest breaks, as noted below.

Ellen Atkins, Patricia Hess, Annette Rogers, and Wanda Fotusky worked in a closed second-floor structure built over the dyer's office in the dye house area, located near the back wall of Mill A and a few hundred feet from the front offices. The superintendent of dyeing and finishing, Charles Arruda, was located in the same area, as were other "management people." The office was open from 6:00 a.m. to 10:00 p.m., to coincide with 2 shifts, and the 4 employees worked different shifts. They punched the time clock.

Atkins spent 2 days a week typing and filing for Arruda, and the other 3 days in making batch cards, filing folders, and doing whatever typing was required by Arruda or other management officials. It would appear that, generally speaking, the primary function of the 4 employees was making up batch cards, which contained the formula for the dye to be put in a given order. Once batch cards

were made up, they would be taken downstairs to the dye office or dropped in a chute into that office.

A December 12, 1977, memorandum from Arruda to the personnel office, requesting a reclassification of Atkins from Clerical A to Secretary Junior, states that she "is currently doing the duties of a secretary," noting that she "takes frequent shorthand, does typing, sorts through my mail, handles confidential information and takes care of my personnel files." The latter references were, Atkins testified, to her duties of typing for Arruda memoranda dealing with employee disciplinary problems, once or twice every 2 weeks.

Although Atkins would leave her office 3 or 4 times a day to go to the front offices, to the quality control area, or elsewhere in the plant, she went onto the dye house floor only "maybe once or twice a week," for 5 minutes per visit, perhaps to talk to an employee about a batch card. Apparently, in making these visits, she spoke primarily to the batching foreman. She was in occasional telephonic communication with other areas, normally speaking to a management representative. Unlike the production employees, Atkins was allowed a full hour for lunch, and, also distinctively, was permitted to take her two 10-minute breaks when she wished.[56]

Patricia Hess spent her time making up batch cards for the dyers and doing some filing. She left the upstairs office only to go to the downstairs office of the dyers to do filing and, once a day, to go to the front office to pick up mail. She took a 20 minute dinner break in the dye house office

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[56]According to Miller, nonclerical, nonmaintenance, and nonsupervisory employees receive either 20 or 30 minutes for lunch and do not leave the plant. Nancy McDaniel testified that the maintenance shop mechanics receive "a half an hour or hour, whichever they want to take."

when convenient,[57] and had one unscheduled 10-minute rest break. Hess, who had begun work for Respondent only in June 1977, testified that she did not "know any of the people on the floor."

On November 3, 1977, Hess presented Arruda with a letter stating that she would be "leaving as of November 18 to assume position of a new job." She began to work for her new employer on November 18, but, having "volunteered to stay until the new girl was trained," Hess also continued to work 3 hours a day for Respondent; after Wanda Fotusky had completed the training of the replacement, Hess finally terminated, around mid-December.

Wanda Fotusky testified that she is the "senior clerical" in the dye house office, under the supervision of Arruda. In the office she calculates dye formulas according to the weight of the lot involved, files formula cards, answers the phone, assigns numbers to new colors, and processes rejections. She leaves the office perhaps twice a day to obtain samples, and four or five times a day to give messages to employees. She takes a 20-minute lunch and two 10-minute breaks.

The Charging Party attempted, *inter alia,* to demonstrate that Fotusky is a statutory supervisor, and, in doing so, introduced some documents signed by her. Fotusky's name appears on employee evaluations which state that they are "to be completed by foreman on any change of rate." The forms contain a paragraph of subjective and conclusionary comments about the employee, as well as a numerical rating of the employee on each of 10 attributes. Fotusky's name is signed under the heading "Approvals" and next to the blank marked "Foreman;" subsequent signatures include that of Arruda and the plant manager. Fotusky testified that she fills out these forms because

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[57]Hess was on a 2:00 p.m.-10:00 p.m. shift.

Arruda asks her to; she works a split shift and therefore knows the rated employees better than he does. She also stated that she does not fill these out routinely, but only when Arruda hands her a form.

Fotusky's signature also appears, in a box marked "Supervisor/Foreman," on a leave of absence request filed by an employee in August 1977. She explained that Arruda asks her "to train girls or go over things with them," and "this was the only place there was to sign." She also noted that Arruda had her sign the form "because I would be taking over more or less all of her duties while she was off."

Fotusky also signed some records of phoned-in absentee reports in a space denoted "Supervisor's Signature," but other testimony by Wanda Lamb makes it appear, as Fotusky testified, that any employee who takes such a call would employ a similar procedure.

The record is relatively silent as to Annette Rogers. Atkins testified that Rogers prepared "submits"—patches of dyed material—and took them to the quality control area, made up batch cards, filed, and answered the telephone.

It seems clear that Atkins, Fotusky, Hess, and Rogers fall within the mainstream of the Board's plant clerical classification. They work in a production area and, although they do not seem to have substantial contact with other production employees, they contribute directly and meaningfully to the production process by making up the batch cards. Atkins testified that their location in the production area was "important" because of the frequent immediacy of the need for the batch cards, in which minutes could make a difference. They are under the supervision of Arruda, who also supervises unit employees.

Atkins is more of an office clerical than the others, but not enough, I think, to warrant treating her differently.

Charging Party contends that she is a confidential employee because she occasionally typed memoranda about "disciplinary problems of employees" and did some filing in employee personnel files; the evidence on this point, however, is too unspecific to permit a finding that Atkins "assist[ed] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations," *The B.F. Goodrich Company*, 115 NLRB 722, 724. There is no showing that the memoranda or the materials filed were intended to be confidential or, indeed, that superintendent Arruda exercised any of the enumerated functions.[58] The Board has held, for instance, that the mere typing of material relating to grievances is insufficient to render an employee confidential. *Weyerhaeuser Company*, 173 NLRB 1170, 1173; *ITT Grinnell Corporation*, 212 NLRB 734. It has recently stated that an employee's "access to confidential information, some of it relating to labor relations, or her having typed the above-described [evaluations of employees, etc.] documents," did not a confidential employee make. *Los Angeles New Hospital*, 244 NLRB No. 157. Furthermore, unless the duties of an employee are concerned with labor relations at a level higher than departmental, a fact not established here, the Board will not consider the employee to be a confidential. *Swift & Company, supra*, 119 NLRB at 1567.

Nor do I agree with the argument that Fotusky was a supervisor of the other 3 clericals. Her hours, for one thing, did not correspond to theirs. I glean from the record that she was an experienced employee (13 years as of 1978) who gave routine guidance and set routine priorities for the younger employees. The evidence most suggestive of su-

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[58] I do not believe that Arruda's conclusionary description of Atkins' duties in his December 1977 memorandum attempting to secure a promotion for Atkins adequately establishes that she was a confidential employee within the Board's definition.

pervisory authority within the meaning of Section 2(11) were the evaluations on employee rate changes signed by Fotusky at Arruda's occasional request, but I think the fact that she only made them out when asked indicates that Arruda looked to her familiarity with the employees for assistance rather than as a recognition of her status.

Hess, as Respondent concedes, was not entitled to vote in the election. On the foregoing findings, however, she should be counted as a unit member in September and October. The other 3 employees were members of the unit then, and, as well, their ballots cast in December should be opened and counted.

4. Carol Bennett

Carol Bennett is the only lab technician in the dye house area on the second floor, located near the office in which the dye house clericals work. At the relevant times, the only other employee in the lab was Ben Bruner, the lab supervisor, who trained Bennett to perform her duties of mixing dyes and sample dyeing new colors. Her job takes her to the production area "every day" to cut samples and get chemicals and dyes, located in different storage areas. Bennett's time in the laboratory amounts to about 80 percent, and other "people" come in occasionally. She gets 20 minutes for lunch, which she takes when convenient and which she usually spends in the dye house office with "the clerical girls," and she takes her breaks (which may range up to 2 hours, depending on her work) in the lab. During the relevant period, she spent an hour or two per week operating the mill switchboard. Bennett punches out for lunch only if she leaves the plant; if she does not do so, a matter of discretion, she is paid overtime, unlike regular production employees.

Certain characteristics of her work routine ally Bennett with the office clericals and others do not. However, because

of the manual nature of her work and the fact that she spends the equivalent of one full day per week on the production floor in various areas of the plant, I find it difficult to consider her an "office clerical." I conclude that she should be placed in the bargaining unit and that her ballot should be opened and counted.

5. Beverly Robertson, Patricia Knowles, and Linda Perkins

Robertson, Knowles, and Perkins perform clerical work in the quality control area. The department is an isolated area in the rear of the plant, surrounded by walls which also enclose the adjacent testing department.

The immediate supervisor of the 3 employees is Dennis Tomlinson.[59] Robertson spends "at least 90 percent" of her time in the office area, primarily engaged in typing letters, reports, and memoranda, including employee "disciplinary reports," for Tomlinson and for salaried personnel located in the nearby research and development trailer; answering the phone; and filling out production reports. Her time away from the office is, in part, spent in collecting mail from the front office in the morning, and distributing it to her own area, to the people in the trailer, and to personnel in the sample department; the latter takes "just a couple minutes." She also occasionally (some weeks, every day) walks to the greige lace warehouse area to see whether certain goods have arrived and, in doing so, may speak to the warehouse supervisor or an employee, for periods ranging from a few seconds to 15-20 minutes. She also does business with the front office.

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[59]While Robertson testified that Tomlinson "doesn't supervise any other areas" but her own, Sherry Hall, a test room employee discussed *infra*, testified that Tomlinson is "over [the] test room area," but not "over any other area" that she knows of.

Robertson, Perkins, and Knowles are in communication with the challenged employees in the adjacent testing room, Smith, Dowdy, Hall, and Durrer, who are in the area of the former employees "all the time," looking for folders and such; Robertson also goes into the testing room on various missions, and orders supplies for that room. During the relevant periods, Robertson worked on the switchboard on a prearranged basis.

Robertson, Knowles and Perkins are allowed 60 minutes for lunch; when they choose not to leave the plant, they eat in their office rather than the canteen used by production employees. They have 2 scheduled 10-minute breaks.

Knowles is in charge of the "finishing desk," checking against standards the finish on orders. While she occasionally leaves her desk to help look for lost goods or to go to the front office to deliver copies, she stays in the quality control office "at least 90 percent, if not more" of her time. When goods have been tested, Knowles, using folders received from the testing room, "writes up an evaluation sheet and . . . put[s] certain results and all the information about the dye order that New York needs to know." With this evaluation, she dispatches a sample of goods to New York for comment. Knowles also does filing.

Perkins is in charge of the "color desk," comparing shades of color to standards. She "does a lot of her work over the phone," speaking with other people in the plant or in New York. If a color is off, Perkins writes a rejection slip which goes to data systems. Perkins also attends meetings with managerial personnel about rejected fabrics and occasionally goes to the dye house to place orders in a basket or to locate a missing standard. Perkins sends cards to New York and to customers, and also files.

Although their duties vary somewhat, as a whole it seems to me that these 3 employees should be considered

essentially production clericals. They work in the production area and are in contact with employees found here to be production employees. Their primary functions clearly contribute directly to the production process. I would include them in the unit and also count their ballots. *Risdon Manufacturing Company, Inc.*, 195 NLRB 579, 581.

6. Sherry Hall, Virginia Durrer, Frances Smith, and Marilyn Dowdy

Four more employees work in the quality control area, in the testing room adjacent to the office in which Robertson, Knowles, and Perkins are located. Hall, Durrer, Smith, and Dowdy perform testing of various kinds of fabrics, such as measuring width, counting stitches, wash testing, hand stretching, "1-P-4" testing (cutting two loops, sewing them together and stretching them on a machine), and drop testing (which also involves cutting a loop in fabric and testing it on a machine). Materials for testing are received in the testing room through a small window. Two of the employees who work from 8:00 a.m. to 5:00 p.m. receive an hour for lunch; the other two, whose hours are 6:00 a.m. to 2:00 p.m., have a 20-minute lunch. Hall testified that the four of them probably do not leave the testing room on business more than once a month.

Mobil Chemical Company, 70 LRRM 1187, a decision by a Regional Director, tends to support Charging Party's contention that these testers should not be included in the bargaining unit; there, however, the quality control technicians resembled laboratory technicians whom the parties had agreed to exclude from the unit. Here, the testers have little contact with, and little similarity to, the office clerical employees. They perform simple, easily-learned manual functions. They could not readily be deemed "office cler-

icals." So far as I can see, there is materially little difference between these quality control employees and those included in the production and maintenance unit in *Ambrosia Chocolate Division of W. R. Grace & Company*, 202 NLRB 788. In view of their many similarities to production workers, I would consider it appropriate to include them in the unit and to count their ballots.

7. Wanda Lamb, Brenda Still, and Regina Meeks

Wanda Lamb and Brenda Still work in a small group of offices off the knitting production floor together with three "supervisors": Spencer, the knitting superintendent, Hawkins, his assistant, and Skipper, engaged in quality control. Lamb, classified as a "Clerical Senior" until around November when she became a "Secretary Junior," is occupied with typing and filing reports and memoranda for the manager (including employee disciplinary reports), with preparing defect reports, and with stamping production tickets with a rubber stamp. The latter function takes Lamb onto the production floor for 30-60 minutes a day, during which time she places labels and the production tickets on machines. Lamb goes to the front offices to "make copies, distribute mail, take something to the personnel department," and will occasionally go to the quality control department to make copies and take samples to be tested. For a total of about 3 weeks during 2 periods a year, she and Still work on the production floor, inventorying the contents of the machines by themselves.

Lamb also fills out absence forms each day, having been given the name of the absentee and the assigned reason for absence by the three knitting shift foremen. Further, she does undefined "work" for the three foremen and the beaming supervisor: "anything [they] would need." She and Still work from 8:00 until 5:00, and take 30 minutes for

lunch; Lamb usually leaves the plant to have lunch, Still does not. Neither takes breaks away from their desks, and apparently have no scheduled breaks. Lamb and Still substituted at the switchboard during the material times. Lamb knows the production employees on the knitting floor by name and talks to them during the day.

According to Lamb, Still (either a "Clerical B" or a "Clerical Senior") does "some" typing, including personnel memos, but her primary function seems to be making up production summaries and, like Lamb, stamping production tickets. Still may also place orders by phone for items with Mill W, although the record is unclear as to when Still assumed that function.

Lamb testified that Regina Meeks (perhaps a "Clerical Senior") performs "generally the same work" at nearby Mill E as Lamb performs at Mill A; Lamb has helped Meeks with her work periodically.

For reasons previously given, it seems to me that the three employees, who are located in the production area, who work with production employees, and some of whose work functions are directly integrated into the production process, are plant clericals within the intendment of prior cases. I would consider them to be unit employees in September and would count their December ballots.

8. Alice Hensley

Far back in Mill A, near the yarn storage area, Alice Hensley (a "Clerical Senior"), and the yarn purchaser, Jimmy Moswer, worked together in the yarn control office.[60] Hensley did paper work in connection with the requisitioning and receipt of yarn. She also typed orders, reports, and memos for Moswer, sometimes taking shorthand, and

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[60]Her office has since been moved, and air conditioning units put in its original place.

she had phone conversations with sellers of yarn. She was required to go into the yarn rooms of Mill A and Mill W, where yarn employees are positioned, to check cases of yarn, looking elsewhere for them if she could not locate them there; this was sporadic, sometimes taking 30 minutes a day, sometimes not necessary for a week. Hensley occasionally worked with knitting office employees to ascertain the location of warps, or asked a foreman to do so. She spent 30-60 minutes a day taking reports to the front office and running copies there. On occasion, when a loading employee was absent, she would go to the loading dock to ascertain the contents of a truck, and would ask the knitting foreman to assign an employee to unload. She also, periodically, ran a machine that makes a "stocking," and sometimes took the stocking to the dye house lab for testing. Hensley takes one hour for lunch, which she has at home, and takes no breaks as such.

In view of the close relationship of Hensley to other production employees, her frequent contact with them as compared to other kinds of employees, her isolation from such other employees, and her occasional use of a machine, I find it difficult to distinguish her from employee Coia, whose "stock control" functions constituted her a "plant clerical" in *Esten Dyeing & Finishing Co., Inc.*, 219 NLRB 286, 287, or employee Bryant, whose similar duties resulted in a similar finding in *Wilson Wholesale Meat Company, Inc.*, 209 NLRB 222, 223. I would therefore include her in the unit in September and count her December ballot.

In summary, I would include Bolding and the 18 employees discussed above in the unit for purposes of calculating the size of the unit in September and October, and I would open and count all the ballots cast by them in the December 6 election except the one cast by Hess.

B. The Majority Status of the Union

General Counsel and Charging Party rely upon authorization cards signed by employees to demonstrate that the Union represented a majority of the employees in the bargaining unit "at some point" on or after September 26. While the purpose of the cards is clear on their face, there was considerable litigation, of the usual sort, about their validity.[61]

The substantive challenge most often made to the validity of the cards concerned representations made to signing employees by solicitors as to the use to which the cards would be put, with the Respondent attempting to show that employees were misled into believing that the cards would simply be used to secure an election. With respect to attempts to so discredit cards, the Supreme Court and the Board have sanctioned a stiff test—a card will not be invalidated simply because, for some reason, the employee believed that its only purpose was to obtain an election; unambiguous cards will be vitiated only when an employee has been deceived, by words adequate to the purpose, into thinking that a card is something less than it purports to be. In *N.L.R.B.* v. *Gissel Packing Co., supra,* 395 U. S. at 606-607, the Court said:

> [W]e think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to

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[61]The card reads, "I hereby accept membership in the Amalgamated Clothing and Textile Workers Union of my own free will and do hereby designate said Amalgamated Clothing and Textile Union as my representative for the purposes of collective bargaining in respect to rates of pay, hours of employment or other conditions of employment."

direct the signer to disregard and forget the language above his signature.

In so holding, the Court brushed aside the assertedly invalidating impact of representations, made "jointly or singly," "(1) that the card would be used to get an election (2) that [the employee] had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election." 395 U. S. at 584, n. 5. The second kind of representation would, I think, lend itself to an especially forceful argument that the employee might have been substantially misled; to tell an employee that he had the "right to vote either way, even though he signed the card," strongly implies both that there would be an election and that the employee was making no commitment by signing the card. The fact that the Court considered this sort of statement ineffective to nullify a card thus indicates the weight to be given to the Court's words that the employees "should be bound" by the language of the card unless it is "deliberately and clearly canceled."[62]

The Board has continued to apply a standard that statements relating to the likelihood of an election are not incompatible with an underlying belief by the card-signer that he is authorizing a union to represent him. *Essex Wire Corporation,* 188 NLRB 397, 415 (employee asked "what it meant if she signed" and was told "it was so that they could vote on the Union later on, this was just to bring it to a vote."); *Hedstrom Company,* 233 NLRB 1409, 1410-

[62]I have undertaken the analysis made below with an eye to the Court's caveat that "trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the [rule that cards will be counted unless the employee is told that the card will only be used for the purpose of obtaining an election]." 395 U. S. at 607-608.

1411 (employee told that other employees "wanted to see if they could get the Union up for a vote" and "if there was enough of a percentage, then it would come up for a vote."); *Keystone Pretzel Bakery, Inc.*, 242 NLRB No. 77, sl. op. p. 8 (union agent said cards would be used "for the purpose of bringing a federal election into the plant, and through this process . . . become the bargaining agent"). The courts have generally agreed with this approach: "But where the cards are, as here, unambiguous on their face, the circumstances must show clearly and convincingly that they were secured through coercion or misrepresentation before they may be disregarded." *J. P. Stevens & Company, Inc., Gulistan Division* v. *N.L.R.B.*, 441 F. 2d 514, 523 (C.A. 5).

It seems probable that an unarticulated factor in such decisions is an appreciation of the solemnity which would likely attend the signing by an average employee of a card which makes him, as this one does, a "member" of a union.[63] Another element to be considered in judging testimony that an employee was misled was alluded to by the Supreme Court in *Gissel Packing*, 395 U. S. at p. 608: "We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1)." That employees might be so inclined is especially indicated in this case, prompted as the employees would have been by the June 28 letters from president Gottlieb regarding their prospective testimony.

Most of the testimony relating to references to an election by card solicitors passes the *Gissel* test. I feel con-

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[63]The testimony of Shirley Winkey bears witness to this: "Everybody was talking about it. You couldn't help it, everybody was wondering who was going to sign the card and all."

strained to point out, however, that the Union, in my opinion, was unwittingly responsible for a good deal of unnecessary litigation and potential deception by originally referring to the possibility of an election. Thus, organizer Harold Bock testified that at the first formal meeting on September 18, he told the assembled employees that the cards were authorizations and that, when a majority was secured, the Union would ask the Company for recognition; failing the grant of recognition, the Union intended to petition for an election. On balance, the likelihood for confusion arising from even the mention of an election to a group of untrained volunteer solicitors, who then repeat these references to other employees, is so great as to outweigh the informational value of such an allusion. It is simpler, and sufficient, to advise would-be solicitors that the card is an authorization card, and to let the matter go at that. Plainly, Bock's attempt to explain the ramifications of the procedures available for securing recognition caused some confusion in his core group, which became amplified further down the line.

Aside from the claim that some employees were told that the cards had only an election purpose, Respondent argued other purported defects at the hearing, and refers fleetingly to some again in its brief. It is asserted, summarily, that 12 identified cards "may be invalid because of supervisory taint." I agree with General Counsel and Charging Party that the Respondent has failed to establish that any of the solicitors asserted by Respondent at the hearing to be statutory supervisors actually occupied that status. Four of the alleged supervisors—James Johnson, Barry Pritchett, Helen Weakley, and Patricia Suter—attempted to vote in the December 6 election and were challenged by Board agents, since their names did not appear on the eligibility list. The Regional Director's Report on Objections, p. 3, states, as to these 4, and 35

other, challenges made by the Board agents, "By letter dated December 15, 1977, the Petitioner agreed to sustain the Board Agents' challenges for the purpose of reaching a determinative election here." The Report goes on to say that the Employer takes the position that 33 of the challenged voters (including the 4 referred to above) are supervisors within the meaning of the Act, and that since "neither the Employer nor the Petitioner contend that the 33 leadmen or foremen enumerated by the Employer are eligible voters, and there is no evidence that sustaining the challenges to these ballots would be contrary to the Act," these 33 challenges would be upheld.

Such an administrative disposition of the challenged ballots does not have any effect on the question, in this complaint case, of whether the 4 individuals are supervisors whose solicitation of cards may have invalidated those designations. Demonstrating that those employees in fact are supervisory employees was Respondent's burden, and such evidence as there is on the supervisory status of the leadmen is insufficient to the task. The Charging Party's agreement in the representation case to sustain the Board Agents' challenges "for the purpose of reaching a determinative election" may well have been reached in the pragmatic belief that a majority of the challenged group voted against the Union; the agreement, in any event, did not preclude General Counsel from requiring Respondent to shoulder its normal burden.[64]

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[64]At any rate, not many employees had some connection with the 4 alleged supervisors in the matter of card-signing. James Johnson, called by one employee a "supervisor," by others a "foreman," and by another a "leadman," did not testify. There was little testimony about Johnson's duties. Emily Winkey, a supervisor, said that Johnson was a "foreman" in "charge of" the estimated 8-10 people "under him": he "made sure they knew what

(Footnote continued on following page)

It would be a fearsome and pointless task to analyze each and every one of the 215 cards admitted in evidence. I shall discuss below only those which appear to merit discussion. Failure to refer to cards as to which only 1 witness testified means that I have accepted that witness' testimony after considering any suspicions or unusual circumstances in the testimony of the witness. Failure to refer to cards as to which 2 witnesses have given conflicting testimony means that even if I were to give credence to the employee proffered for the purpose of proving a misrepresentation, his or her testimony would not, under the principles previously cited, cause invalidation of the card.

(Footnote continued from preceding page)

their duties were and how to perform their duties." As she described his work functions, they seemed the essence of leadman duties. Employee Carl Chandler testified that "Jimmy Johnson" "gave" him his card, but offered no other testimony about the transaction. Lewis Davis also received his card from Johnson, who said only, "Here's a union card if you want it." Carl Washington, whose card I am rejecting for another reason, testified that he received his card from Johnson after asking him for one; Washington did not work on Johnson's shift. Clarence Sparks, whose card Johnson did not solicit, saw Johnson at "a couple" of Union meetings at which Johnson was silent. The Board has held that where a "minor supervisor" "passed on" some cards, the conduct was insufficient to vitiate the cards. *Aero Corporation*, 149 NLRB 1283, 1286, *Engineers & Fabricators, Inc.*, 156 NLRB 919, 943. See also *N.L.R.B.* v. *WKRG-TV, Inc.*, 470 F. 2d 1302, 1315 (C.A. 5), holding that "[s]o long as nothing in the words, deeds, or atmosphere of the alleged solicitation contains the seeds of potentional reprisal, punishment or intimidation, the involvement of the supervisors does not rise to the level of supervisory solicitation that we condemned in [a prior case]."

Barry Pritchett was involved in the solicitation of 3 cards. Lorraine Cox said that Pritchett, a "leadman," told her that cards were being passed out, and she obtained one from another em-

(Footnote continued on following page)

On some of the cards, dates were entered by other persons. These cards bear a stamp of the Board Regional Office on their reverse sides. Organizer Bock testified that the cards collected as of September 27 were sent to the Board on that date, along with the petition for an election.

(Footnote continued from preceding page)

ployee. Pritchett solicited Michael Bell, a longtime friend; Bell did not know what Pritchett's job was. Aura Anderson got his card from Pritchett, who worked in a different building and who, so far as Anderson knew, just "ran a machine."

Patricia Suter was involved in the solicitation of cards from 5 employees. Suter, who described herself as a "leadperson and a lace inspector," gave the following testimony, and no more, as to the nature of her job: to "guide the people in my department, see that the work gets in and the work flow gets out, and everybody is doing their job." There are 7 people in her department. Three of the five employees solicited by Suter testified that they did not recall whether they knew that Suter was a leadperson at the time of the solicitation. Suter's description of her duties does not indicate more than that she belonged to that group of "straw bosses, leadmen, set-up men, and other minor supervisory employees" which Congress did not intend to exclude from the Act, *N.L.R.B.* v. *Security Guard Service, Inc.*, 384 F. 2d 143, 147 (C.A. 5), quoting from S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947), nor do I detect that she was viewed by employees as an agent of Respondent whose influence was considered significant.

Finally, Helen Weakley, who passed out cards to 2 employees, described her job as follows: "I'm a lead warper, I run three machines, I have three people depending on me each day to advise them what to do on the job." She told the two employees to whom she handed cards that "if they liked to, they could sign." As with Suter, there is insufficient indication that the employees could reasonably have felt coerced by Weakley's approach to them.

In sum, the evidence at best shows that the alleged supervisors "direct to some extent the activities of other employees in their department," authority found insufficient to constitute as supervisors the "working foremen" referred to in *Davidson-Paxon*, 180 NLRB 470, 471, n. 4.

The Board stamp shows that cards were received on September 29. The Board holds that such a stamp, without more, establishes that the card was signed prior to the date indicated by the stamp. *J. P. Stevens & Co.*, 179 NLRB 254, 278. I shall, of course, apply that rule in this case.[65]

Mary Carter did not date her card (G. C. Exh. 33), which bears a date of September 19, but the Regional Office stamp of September 29 indicates that it was signed before September 29, and, as General Counsel urges about a number of such cards, I will count it as such. For the same reason, I reach the same conclusion as to the cards executed by Jerry S. Chandler (G. C. Exh. 36), Michael Mitchell (G. C. Exh. 40), Dewey Shifflett (G. C. Exh. 41), Sylvia Snow (G. C. Exh. 48), Curtis J. Hunt (G. C. Exh. 65), Wayne B. Bryant (G. C. Exh. 70), David Douglas (G. C. Exh. 78), Harry B. Riner, Sr. (G. C. Exh. 91), Mary Marshall (G. C. Exh. 93), Burlynn Shipley (G. C. Exh. 96), Ronald Sacre (G. C. Exh. 101), William L. Richards (G. C. Exh. 111), Wilson Rollins, Jr. (G. C. Exh. 125), Vanard Hagins (G. C. Exh. 163), Ronnie W. Powell (G. C. Exh. 165), A. G. Perkinson (G. C. Exh. 168), Chester L. Lucas, Sr. (G. C. Exh. 169), Jeffrey H. Estes (G. C. Exh. 183), Wesley Simmons, Jr. (G. C. Exh. 210), Mervil Pritchette (G. C. Exh. 216), and James Greene (G. C. Exh. 259).

The "principal argument" against the cards, in Respondent's view, is that many of them were authenticated at the hearing by witnesses other than their signatories. Since there is no question where the Board stands on the propriety of such authentication, *McEwen Manufacturing Company*, 172 NLRB 990, 992, *The Stride Rite Corporation*, 228

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[65]At the hearing, counsel for Respondent, in answer to my question, seemed to agree that the date stamp was probative of when the Regional Office received the card, and that "if not rebutted . . . I would have to rely on it."

NLRB 224, 234, and I am bound by the Board's position, I need not further consider the argument.

I discuss below a number of cards which appear to warrant specific consideration.

Della Carter testified that she signed G. C. Exh. 32 on September 22. The card, which she said she filled out, states that she worked in "Mill A," but she testified that she began working in "Mill E" in May 1977, and that she never worked in Mill A except "during the first and second week in July, during vacation" of an unidentified year. The card is filled with erasures, including an obvious erasure on the signature line, none of which Carter could explain.

Despite my impression that Carter was an honest witness, I am unable to conceive how a Mill E employee could have written on the card that she worked in Mill A. In all the given circumstances, I would not count the card of Della Carter as a conferral of agency authority in September.

Michael Mitchell gave testimony authenticating 9 cards (G. C. Exhs. 41-49) he had solicited. He testified that all (with the exception of Steven Robinson) the persons he solicited left him for a short time, and then, on the same day, returned and handed him signed cards. Despite Respondent's repeated objection to such testimony by a solicitor who has not seen the act of signing, the Board has authorized this kind of authentication. *McEwen Manufacturing Company, supra,* 172 NLRB at 992.

It later developed, in Mitchell's testimony and that given subsequently by his uncle, that in fact his uncle had authorized Mitchell to fill in and sign a card for him.[66] There was, in addition, subsequent testimony by Sylvia

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[66]This card was ultimately rejected for reasons that nearly beggar description, at least in a footnte.

Snow that she had gotten Virginia (or Jane or Jean) Morris to read her card (G. C. Exh. 48) to her because Snow is illiterate, and authorized Morris to sign it for her, after which Morris returned the card to Mitchell, who had given it to Snow in the first place. Roger Snow, Sylvia's husband, testified that he had no dealings with Mitchell about his card (G. C. Exh. 47): he was home during that week in September, and "my wife called me and told me and I told her to get Jean Morris to sign it."

Although the Snows seemed honest witnesses, their testimony does not materially detract from the very strong impression I had that Mitchell was a basically credible witness. Given that Mitchell, a somewhat limited man, was testifying about the collection of cards some 10 months before, in circumstances in which "everybody was all scared and shook up because they thought they were going to get fired over all this," it does not surprise me that he might get the details confused.

I think it appropriate to count the cards signed by the Snows. Sylvia, who could not read, testified that she "thought [the card] was for the company," and said that Morris read to her "off the card" that it "was more money and better benefits." Morris was not called to rebut this. Roger, who did not see the card, was told by his wife that "if we wanted more money and better benefits, sign it." He further testified, contradicting his wife's testimony that she thought it was "for the company," that she told him "it was a union card or for a union." I seriously doubt that Morris read the card to Sylvia Snow so as to say that the card stated "more money and better benefits." Roger's testimony discloses that his wife told him it was "for a union." I would count both cards, Sylvia's as of some time prior to September 29, and Roger's as of September 20.

The card signed by Nancy Marks (G. C. Exh. 51) was accompanied by some very convoluted testimony as to when

she signed it. Although Marks said that she signed on September 26, the date shown on the card, her testimony in explanation of a contradictory statement given to the General Counsel leads me to conclude that the date is unreliable. Since the date stamp on the back of the card is May 17, 1978, I shall not count it.

The card (G. C. Exh. 72) purportedly signed by Shirley Berry shows that the date of signing (September 20) was changed and that an erroneous (by two digits) zip code is entered. Furthermore, I reach quite the opposite conclusion from General Counsel's argument, surely made tongue-in-cheek, that the writing on the card "closely conforms" to a handwriting specimen of Berry's. I would reject this card.

Doris Berry said that she executed G. C. Exh. 75 on the date shown, September 20, but she also testified, according to the transcript, which may be in error, or which she may have intended to clarify by her answer to the next question, that she did not "work there last September." The symbol for the month shown on the card appears as a "9" scratched over what looks like a "2." The first name was written over an erasure; Berry testified that this happened because she "misspelled" her name and started over. The card carries a Regional date stamp of September 29. Respondent expressed "[n]o objection" to the card.

Despite these curious details, I am inclined to believe Berry's testimony. I think it obvious that she did work for Respondent in September; she said she "never know[s] dates"; and I too have had difficulty with scribbling the initial letters of my name on occasion. Berry was an extremely believable young woman. I would count the card.

Carlton Dickerson, who cannot read or write, signed a card (G. C. Exh. 94) filled out for him by his brother. The difficulty I have here is timeliness—the card is dated "9-28" and the rear date stamp is May 17, 1978 (it would appear

from this and some other cards that after sending in the first batch of cards in support of the election petition which reached the Regional Office on September 29, the Union sent no more cards until May 1978). It does appear, however, that all the entries were made at the same time and by the same pen, and I would indulge a presumption that the date shown is accurate. *Cato Show Printing Co., Inc.*, 219 NLRB 739, 756 (Cory).

Harry B. Riner, Jr., signed G. C. Exh. 98 on September 22. Among other things, Riner testified that Union organizer Bock said at a meeting that "the only thing it was to do was to petition the National Labor Relations Board for the vote," although he subsequently agreed that it was "possible" that Bock also said that the purpose of the cards was to have the Union represent employees. It later developed in Riner's testimony that he had not heard Bock speak until after he signed the card, that the person who solicited his signature had said "it was, more than anything else, to petition the National Labor Relations Board about whether or not to have a union," and that Riner "skimmed" the card "halfway" before signing it. Riner, Jr. attended Union meetings, passed out cards, and distributed leaflets. He became a "supervisor" on January 1. His nervous demeanor, and the foregoing circumstances, lead me to believe that he misrepresented Bock's speech, although that issue is of no consequence in any event, since Riner did not hear Bock speak until he had signed the card. I consider the card to be valid. Similarly, I think that John R. Collins, testifying with respect to G. C. Exh. 104, as discussed *infra*, mischaracterized Bock as saying that they "have to have an election before we could have a union." I am convinced that Bock would have made no such positive statement, although it certainly appears that Collins thought he had.

Gregory G. Cooper testified that he executed G. C. Exh. 112 at the instance of employee Curtis Pritchett on the street outside of his roominghouse. While Cooper did not fill in the date of September 20, he saw Pritchett do so.

Cooper's testimony is in serious conflict with material contained in a May 11, 1978, affidavit given by Nancy McDaniel concerning her union activities. In that affidavit, McDaniel states that on September 20, she and her husband met in the Tastee Freez parking lot with James Johnson and several other employees Johnson had brought with him. Gregory Cooper was also there; about this, McDaniel had a clear recall. Although she first states that she saw Cooper sign a card that night, she later modifies this recollection: "I don't recall actually seeing Cooper put his signature on his card, but he got a card, we told him to read it, make sure to sign it, not print it, and date it, there were so many people there. I don't recall the exact details but I recall him leaning on the hood of a car with a pen in his hand and a card. He gave the card to either me or James,[67] and I initialed it before I left the parking lot." G. C. Exh. 112 bears the initials "N. W."

Although McDaniel was not questioned about this portion of her affidavit, I can hardly ignore it. That there was only one "Gregory Cooper" in Respondent's employ at the time is attested to by G. C. Exh. 287, a stipulated list of employees.

I believe that Cooper lied about signing the card at the behest of Pritchett and that, instead, he signed in the Tastee Freez parking lot. This made his authorization no less valid, however, unless the argument of supervisory taint by the presence of James Johnson is accepted. Be-

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[67]This could be James Johnson, but it is more likely her husband. In the affidavit, McDaniel occasionally refers to both of them as "James."

cause, as earlier stated, there has been no substantiated proof of the supervisory status of Johnson, I would not accept the contention.

Michael A. Bell testified that Barry Pritchett, alleged by Respondent to be a supervisor, solicited G. C. Exh. 117 on September 19. Bell's testimony that he did not know Pritchett's job title or work function, other than that he "runs a machine," despite their friendship of 15 years and the fact that they see each other once a day, seemed incredible, although Bell was an extremely believable witness.[68] Nonetheless, the absence of any substantive proof of Pritchett's supervisory status moots that issue.

The card signed by Dwight Ferrell (G. C. Exh. 124) is dated October 25, and therefore cannot be counted, under General Counsel's self-imposed limitations period expiring October 16.[69]

A card signed by Rebecca C. Rogoll, in evidence as G. C. Exh. 170, has been withdrawn by General Counsel on brief.

William Figgins authenticated 23 cards at the hearing, the largest number of any single solicitor. Despite the efforts of counsel for Respondent to shake Figgins' credibility, I remained persuaded that Figgins was one of the exceptionally impressive witnesses at the hearing. Very often, one finds witnesses credible because there is no particular reason for disbelieving them. Occasionally, however, a witness will convey a strong impression that they are being honest; Figgins was one of the latter. Mistakes

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[68]I note, however, that Peggy Taylor, a good witness, had no idea whether or not her own mother was a leadperson: "She's just my mother." T[illegible]ay be some evidence of the malaise purportedly afflicting the wo[illegible] place.

[69]Perhaps a happy circumstance for General Counsel. Ferrell's printed signature on the card appears "Ferrelle"; when asked about the superfluous final "e," Ferrell testified, "I must have been in a hurry when I signed it."

about the details of solicitation made by Figgins in a May 1978 affidavit to the Board were the kind anyone might make in describing two dozen acts of similar nature engaged in over a period of a few days some 8 months before the affidavit was given; at the hearing, Figgins noted that, after realizing the mistakes, he himself had brought them to the attention of General Counsel prior to the hearing. The errors were of the peripheral sort that a less conscientious person, interested only in consistency, might have ignored.

Figgins testified that, as a rule, he solicited signatures by asking other employees if they would like to represented by the Union, after which he would ask them to read the card. Respondent produced 5 card-signers whose cards Figgins had authenticated. Beatrice Bibb, saying it was "hard to remember exact words," testified that Figgins told her "[i]f we got enough cards signed, we would have an election and we would have a vote." However, she read the card before she signed it, and she subsequently testified that Figgins "probably" said that "they were trying to get the company to recognize the union."[70] Vanard Hagins said Figgins "told me that they were trying to get a union in, trying to get as many cards signed as they could so that they could get an election, and see about getting a union." He also asked Figgins, after reading the card, if it meant that "we belonged to the union because that's what the card said," and Figgins replied that "right now it wasn't, it was to get an election and for charter members and if the union didn't come in, then we wouldn't be involved one way or the other." Maybelle Watson testified that she received her card from Figgins and Thurmond Dickerson, and that Dickerson had, an hour earlier, said to her, "they

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[70] I note that Bibb signed an attendance list at the September 25 Union meeting.

wanted to see if they had enough signatures to have a vote." She denied that Figgins asked if she "wanted to be represented by a union." Rebecca Rogoll testified that Figgins asked her if she would be interested in signing a card "to determine if there were enough signatures to contact a labor representative," telling her that the card "was not a binding contract."

In his initial appearance, Figgins was not asked to detail his conversations with the employees he solicited, although there surely must have been some. Figgins appeared in rebuttal only to explain why he had not returned Rogoll's card upon request, as she had testified. While it is likely that, in the course of conversation with solicited employees, Figgins might have referred to the possibility of an election, which he did not disclaim at the hearing, it seems most probable that, as he testified, he also told the employees that the purpose of the card was to secure recognition. Thus, Iris Cowherd, called by Respondent to recount what a purported supervisor had told her about signing,[71] also testified, on cross-examination, that Figgins told her "the card was to represent the union, to get the union in for better benefits." I am inclined to accept Figgins' testimony as corroborated by Cowherd, that he told employees that the cards were designed to secure recognition; any references to an election, such as those described above, would not have vitiated both the cards and Figgins' affirmtive representations under the applicable precedents.

William Maxton authenticated G. C. Exh. 171 as his card. Two signature and writing samples in evidence disclose significant dissimilarities between those samples and Maxton's card. While he testified that he signed the card on a machine which was vibrating, I do not believe that

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[71] I find nothing coercive in the testimony of Cowherd on this score.

explanation can account for the marked differences; I call the reader's attention to the word "Knitting," the letters "W" and "m" in the word "William," and the "x" in the word "Maxton." I would not count Maxton's card.

General Counsel, on brief, withdraws reliance on G. C. Exh. 172, signed by Robert Trice, because it was not executed until November 4, subsequent to the self-imposed cutoff date, and takes a similar position as to G. C. 178, signed by Frankie Williams some time after October 16.

I would not count as material the card (G. C. Exh. 176) executed by Carl Washington. The card bears a date of October 7; Washington did not fill in that date, and while he thought he signed the card "in October," he did not know whether it was early or late in the month. I do not think the proof establishes that Washington signed prior to the October 16 cutoff date.

Everett J. Cromer (G. C. Exh. 189) and Ernest Ellis (G. C. Exh. 190) signed cards for James McDaniel in the Tastee Freez parking lot. Ernest's father, George Ellis, described by McDaniel as a "foreman," had come with his son. McDaniel testified that he arranged independently with Cromer to meet there; although McDaniel also said that George Ellis had told him that "he would bring some of his men down to sign cards," the only one he brought was his son Ernest. Since Cromer confirmed that he and McDaniel had agreed to meet at the lot, there could have been no influence on Cromer by the alleged supervisor George Ellis, whose authority is undisclosed by the record, nor on the younger Ellis, for the latter reason.

A clash developed between James McDaniel and Luther Perkins (G. C. Exh. 191) as to whether Perkins signed his card at home or in the machine shop, and whether he signed immediately or waited a few days. Regardless of that issue, there can be no doubt, in view of the fact that Perkins says that he "thought about" signing for a "couple

of days," that he fully intended to authorize the Union to represent him.

James McDaniel authenticated a card signed by Richard Cooper (G. C. Exh. 197). The card is dated October 3, but McDaniel did not recognize the writing of the date as his, nor did he know who filled in the date.[72] He recalled that he passed out this card after the "other ones [he] testified to," but, asked "how much after," as first said "I don't remember." While he did not "believe" it could have been as much as 2 months, "I don't remember just exactly how long it was. It was possibly a week to two weeks, I don't know." In this context, and since the date stamp on the card is May 1978, I am not persuaded that the card was signed by the cutoff date of October 16, and will not rely on it.

After numerous unsuccessful attempts to subpoena certain witnesses, General Counsel offered in evidence 7 cards along with copies of W-4 forms executed by 6 of the employees.[73] This method of authentication has been approved by the Board, *G. P. Putnam's Sons, Inc.*, 226 NLRB 1256, 1268.

The signature on G. C. Exh. 254 appears to be identical to the signature on the W-4 form executed by Raymond L. Miller. The date shown on the card, September 30, was obviously executed by the same hand. In *Cato Show Printing Co., Inc., supra,* 219 NLRB at p. 756, the Board affirmed a holding that, in such circumstances, the card was "presumably signed on the date affixed to the card." I shall therefore count Miller's card as of September 30.

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[72]The writing is clearly not in Cooper's hand.

[73]Respondent later produced an employee who had signed one of the cards, so the discussion hereafter concerns only the remaining 6 cards.

Other than the "J" in the first name, the writing on the card marked as G. C. Exh. 255, purportedly signed by James P. Franck, is strikingly similar to the specimen, including such characteristics as the slant of the writing and the numerals. Because my experience is that people do alter the style of their signatures on occasion, I shall include Franck's card as of September 21.

G. C. Exh. 256, dated September 23, bears the name of John Ellsworth. Ellsworth was terminated on September 30, and his personnel file could not be located. General Counsel relies on *Renel's, Inc.*, 202 NLRB 580, 583, where the Administrative Law Judge counted an unauthenticated card on the following reasoning: "Since the card was in the possession of the [Union] and no evidence that either the signature or the date was not authentic was offered, I think a *prima facie* case of validity has been established. . . ." In the present case, however, since Ellsworth's personnel file was lost and since General Counsel unsuccessfully served three subpoenas on Ellsworth, I do not see how Respondent could have established the lack of authenticity of Ellsworth's signature without going to a good deal of trouble, such as searching city records, of the kind which General Counsel did not choose to incur. I reject the card.

The card for Kenny Eppard (G. C. Exh. 257) is sufficiently different from the W-4 form, both in signature, style, numerals, and address (the W-4, dated August 5, 1977, gives the home address as "Quinque, Va."; the card, dated September 20, "Slandersville, Va."), as to lead me to reject it as unreliable.

The distinctive signature of Ernest Collins on his W-4 form is replicated on G. C. Exh. 258. I will include Collins' card as of the card date of September 23.

The card for James Greene (G. C. Exh. 259) bears a script signature totally unlike the printed signature on the proffered W-4 form. However, in the body of the W-4 form,

where the employee is instructed to "Type or print your full name," the name James Greene appears, defiantly, in script writing which is identical to the signature on the card. I shall count the card. Since, however, the card date of September 21 was plainly written by another person, I shall consider that the card was signed some time before September 29, the date stamp on the reverse side.

Several witnesses testified that they did not, or could not, read the cards which they signed. Failure or inability to read raises interesting questions. While, under *Gissel Packing,* a representation that "the card is to get an election" is not considered to invalidate the card for the reason that the signer is deemed to have understood its broader purposes from having read it, that presumption is necessarily removed when the signer credibly testifies that he did not read it. Where he has not read the card, it may be argued that the statement "the card is to get an election" is fatal, since it would present the *only* purpose communicated to the nonreading signer. Additional legal distinctions might be drawn between literate nonreaders and illiterate ones (and perhaps between situations in which the solicitor is aware of a literacy problem and those in which he is not).

Some cases indicate that where an employee has not read a card, the recitation to him of a single purpose constitutes a misleading representation of the whole of the card's purposes. Thus, in *Jas. H. Matthews & Co.,* 149 NLRB 161, 162, the Board discounted a card because the employee was "unable to read and he signed his card only because union adherents soliciting him, who did not read the card to him, told him that the purpose of the card was to bring about an election." "[S]igned his card only because," it should be noted, implies of finding of causality. In *Trend Mills, Inc.,* 154 NLRB 143, 144, cards were held unreliable where the employees "did not read the cards,

and authorized other employees to sign on their behalf after being told merely that the cards would be used to secure an election in the plant." Here, no causality is suggested; the representation seems to have been sufficient to invalidate.

Trend Mills was applied in *Yazoo Valley Electric Power Association,* 163 NLRB 777, 783, to the card of an employee who could read "a little," but did not read the card he signed after having been told it "was for to get an election." The Trial Examiner ruled out the card, finding no evidence that the employee knew that it "might also constitute a designation of the Union as his bargaining representative." On the other hand, in *Fabricators, Incorporated,* 168 NLRB 140, 145, the Trial Examiner held an employee (Knaus) to his card, despite his testimony that he did not read the card and was told that its purpose was to "receive information on the union"; the Trial Examiner felt that to conclude that an employee did not apprehend the effect of his act would be "either to downgrade his apparent intelligence or to charge him with irresponsibility." The same view was taken by the Trial Examiner in *Essex Wire Corporation,* 188 NLRB 397, 413-414.

Perhaps the soundest approach, in the light of this somewhat conflicting authority, is the broad one of judging the reliability of the cards "in light of all the circumstances surrounding their signing," *Kimmel's Shop Rite,* 213 NLRB 440, 447, to determine whether the purpose of the cards was "adequately communicated," *Ruby Concrete Company,* 213 NLRB 724, 727. Thus, the Trial Examiner in *Central Soya of Canton, Inc.,* 180 NLRB 546, 561-562, pointed out circumstances which made it clear that, despite their having failed to read the cards, the employees intended to authorize the union to represent them. That is the approach I shall use in the present case.

Ernest A Lettner, who signed G. C. Exh. 29 on September 20, testified that he did not read the card before he signed it. He also said that the person to whom he returned the card said that "the purpose of the card was to see if there were enough people interested in the union to hold meetings"; he then amplified this statement to "[t]o see if there is enough people interested in the union where they could hold meetings and have the election." Lettner did not, however, attribute any such explanation to the individual who *gave* him the card. Since Lettner signed what he certainly knew to be a "union card," with all that might entail, without any representations by the solicitor, it seems fair to regard such an act as a full-fledged authorization.

Lorraine Cox (G. C. Exh. 49) testified that she told another employee to sign a card for her after being asked by leadman Pritchett "how would I like the union to come in . . . maybe for more money and better benefits." She could not "remember whether [she] really" saw the card or not. I think the circumstances indicate that Cox intended to "vote" for the Union.

Elizabeth Mitchell, who did not read G. C. Exh. 53, was told "it was to represent the union. I would be represented by a union and there would be an election held." Since it was communicated to Mitchell that she would be "represented by a union," the subsequent reference to an election would not seem to vitiate her undrstanding that she would be so "represented."

Harry B. Riner, Sr., signed G. C. Exh. 91, but did not read it. Initially, Riner said that the card was signed "to have somebody represent us in the union," and later "to see if we could get enough members to have a union to represent us, and still later "to get somebody to represent us in a union." While he referred on cross to an election, he soon reverted to "them saying something for somebody

to represent us, and the card that I was signing was to see whether or not enough people wanted to get one in." Since Riner Sr. had previously belonged to a union and specifically stopped at the home of another employee to pick up his card, I conclude, given all the circumstances, that the card should be counted.

The cards solicited by John R. Collins give rise to difficulties. Thus, Collins, although I think erroneously, testified that organizer Bock said at the September 18 meeting that the card was "[f]or the union and also for an election, you know." While the "purpose was to get a union organized," we 'have to have an election before we could have a union." His pretrial affidavit had the union organizers telling the assembled employees on September 18 that the cards "were for the union, and to get the union in. They said they would like to have 51 percent of the people in the plant or a majority sign these cards before we could have an election for the union." It seems evident that Collins' ambivalent state of mind about the purpose of the cards could have caused him, depending on the circumstances, to refer only to an election objective in making subsequent solicitations.

Collins testified that he told David Lamb G. C. Exh. 105) that the purpose of the card was "to get a union in the plant." Lamb, who can read "a little bit" but did not read the card, said Collins told him "[i]t was to get enough cards signed to have an election." A pretrial questionnaire filled out by Lamb, however, indicates that Lamb was told that the card was both for an election and to authorize the Union to represent him, and that he was *not* told it was only for an election. Lamb further confirmed Collins' testimony that Lamb had told him he thought there should be a "change" at the plant. I would consider the card valid.

Collins testified that he told Jackson Lamb (G. C. Exh. 106), who cannot read or write, that the card "was for a

union, and I would also like to have 51 percent to sign up to have an election." Lamb replied that "he would like to go along with getting a union in at the plant," and placed his X on the card. Jackson Lamb did not testify. Since he was told that the card "was for a union," I would think it should be counted.

Wilson L. Rollins, Jr., signed G. C. Exh. 125 at the behest of Mopey Williams, who first asked "would I like to have more money," and then told him that the card "means for a union to come in, maybe to get an election if we get enough signatures, and then you could join it later after it come in." Rollins did not read the card. Since Rollins was told that the card "means for a union to come in," I find that its purpose was sufficiently communicated to him.

Peggy Taylor testified that she signed G. C. Exh. 177. At first, she said that she did not read the card "before [she] signed," but later, asked if she had signed as a favor to the solicitor, testified, "No, not really, I knew what it was, but then I did read the card." The second quoted passage seems to indicate that Taylor read the card immediately after she signed it. Taylor did not recall anyone saying anything to her about the card.

Taylor thought that either her mother, Mary Morris, a leadperson, or leadperson Pat Suter gave her the card. Suter testified that she "think[s]" she gave Taylor the card, saying it "was to represent a union to come into the plant and have a vote," and Morris recalled Suter asking "if we would sign a card to have the Union represent a vote." The notion of representation conveyed by Suter would probably be sufficient to validate the card, even in the absence of Taylor's apparently concurrent reading of the card before turning it in.

Robert Smallwood testified that James McDaniel gave him G. C. Exh. 188, saying it was "to see if we could have

enough votes to get a union in, to see about getting one in." An honest but clearly uncertain witness, Smallwood also said that he did not read the card. Subsequently, he attributed to McDaniel the remark that they "[h]ad to get so many together before you have the Labor Board to come in to have a vote or something." On rebuttal, McDaniel testified that he told Smallwood, as he told others, that "we were working to get a union in the plant to represent us . . . and we needed enough personnel to have an election to get the Union in to represent us and once we had enough people to get the election, then we would petition the Labor Board for the election. Then, after that, we needed 51 percent of the people to vote."

Perhaps the line between this case and the preceding ones is imprecise, but it seems to me that the thrust of McDaniel's own testimony is that he held out a firm commitment of an election as the end result of signing a card. Since Smallwood did not read the card, this would be the only result of which he would be aware. It is unlikely that his signature can be considered a clearcut authorization of the Union, and I would reject it.

As previously discussed, McDaniel also solicited a card from Everett J. Cromer (G. C. Exh. 189), telling him, according to McDaniel, the same sort of thing he told Smallwood. Cromer testified that he read the card "[t]he best I could with the flashlight, but not very much."[74] Cromer also at first testified that he remembered merely signing the card, but, confronted with the card, agreed that all of the identifying information aside from the date was filled out by him.

Cromer had been a union member 35 years before. I tend to believe that, even reading the card "not very much," he would have been aware of the printed purpose of the

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[74]The signing occurred at night in a parking lot.

card; it does not take "very much" reading to accomplish that.[75]

James Lam, who signed G. C. Exh. 253, testified that a fellow employee "asked me would I sign a union card, a little blue card, to let the union come for a vote, so they could have an election." He filled in the card completely, but said that he did not read any of it other than the part designed for identification matter.

Lam signed hastily: "The knitting foreman was coming up the aisle so I had to give him the card back." Lam seemed an honest witness, and I am inclined to believe that he did not read the card. Although he had previously belonged to a Carpenter's local, his complete disavowal of having read the card, and the total absence of evidence that any purpose was communicated to him other than the solicitor's request to "let the union come for a vote, so they could have an election," indicates that the card should be rejected, under the holding in *Trend Mills, supra.*

A stipulation in evidence (G. C. Exh. 288, page marked September 30) shows that David Gallihugh terminated on September 29; his card, G. C. Exh. 27, would terminate with him on that date.

Of the 215 cards in evidence, I have found above that 14 of them should not be counted, 5 for the reason that they appear to have been executed after October 16. On September 26, 1977, there were 333 eligible employees in the bargaining unit (including the 18 challenged employees here found entitled to vote). Without counting those 22

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[75] I need not discuss the other cards passed out by McDaniel, since there is no evidence that the remaining employees solicited by him did not read the cards. I note that although McDaniel testified that he "told all of [the employees] pretty much the same thing" as he told Cromer, Luther Perkins (G. C. Exh. 191), a witness for Respondent, testified that McDaniel's solicitation consisted only of "just ask[ing] what I thought about the union."

cards which bear various September dates but which, I have found above, should only be considered as having been signed some time before September 29, the date of the Regional Office stamp, the Union had secured by this time 165 valid cards, just short of a requisite majority of 167.[76]

As of September 27, however, when the unit (including the 18 challenges) had dropped to 331 as a result of terminations, the Union had obtained 5 more valid cards. It thus broke through to majority status (170 cards in a unit of 331) as of that date. While it is possible that a number of the 22 cards referred to above as not being subject to precise dating before September 29 were in fact signed on dates which would have given the Union a majority prior to September 27, on this analysis the first clear majority status was gained on September 27.

By September 30, there were 327 employees in the unit, and there were 199 valid cards, including the 22 previously mentioned and excluding the card of Gallihugh. Since, in the unit as composed on September 30, the Union required 164 valid cards for majority status, it surpassed that requirement by a margin of 35 cards. By October 3, when the unit consisted of 326 employees, the Union had a total of 201 valid cards, or a 37-card excess over a majority.

Thus, the Union, "at some [material] point, " *Gissel Packing Company, supra,* had obtained a clear majority of valid authorizations. It may be that there is a margin

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[76]General Counsel's useful Appendix II to his brief contains a number of minor errors, such as placing Susan Carter's card as a September 29 designation instead of the correct date of September 21, and indicating that Gregory Ellis' card was signed on October 6 rather than September 27. I have appended hereto as Appendix A my own edition of that chronological listing of cards, incorporating the foregoing findings and making other minor changes in placement.

of error in my appraisal of the legitimacy of the cards; but even if I am wrong by as many as some 3 dozen cards, which seems unlikely, the Union would still have attained majority standing at an appropriate point.

C. The Propriety of a Bargaining Order Remedy

In the December 6, 1977, election, the tally of ballots indicated that the Union had won by 1 vote, 144-143. That count did not, of course, include the votes of the 18 employees which, I find, were entitled to be tallied. Since the Union opposes the counting of 17 of these ballots, it would not be rampant speculation to suppose that, when they are opened and counted, the Union's tentative victory will turn into defeat.

By October 3, according to my calculations, the Union had secured 201 signed indications of majority support, representing about 61 percent of the complement. After the votes are finally counted in the December 6 election, however, it may well be that the Union secured no more than 47 percent of the votes in that poll.

What would account for the substantial loss of support for the Union? One factor could be a turnover in personnel; there is no evidence on that score, but one might suppose that new employees would support the Union in roughly the same ratio as those who departed. Another factor, which Respondent would surely urge, is the persuasive effect of its preelection campaign. General Counsel and Charging Party argue that the decrease in support was likely due to the unfair labor practices committed by Respondent beginning on September 26. They further argue that those violations, as compounded by the June 1978 wage increase, were of sufficient gravity to taint any election held after December 1977, and that, instead of ordering a new election now (or, after appeal, perhaps 2

or 3 years from now), it would be appropriate to order Respondent to bargain with the Union.

In *Gissel Packing Company, supra,* 395 U. S. at 614-615, the Court approved the practice of issuing such remedial bargaining orders, upon a showing that at one time the union attained majority strength and a determination by the Board that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." Whether Respondent's past unfair practices are subject to neutralization by traditional remediation is a matter of some doubt.

I have found above that soon after the inception of the Union efforts, Respondent reacted by instituting a survey of employee attitudes which amounted to a promise to rectify grievances and thus erode employee support for the Union, and that it thereafter delivered on its promise, not only by moving supervisors around, but also by giving magnanimous wage increases in December 1977 and again in June 1978. Along these same lines, Respondent also dramatically emphasized its role as the source of all benefits by declaring to employees, on the eve of December 6 election, the existence of a profit-sharing plan which was both tenuous and completely unknown to the employees.

These unfair labor practices had general application to all employees. Based on precedent, the wage increases alone would be sufficient predicate for a bargaining order, the Board holding that "[i]t is difficult to conceive of conduct more likely to convince employees that, with an important part of what they were seeking in hand, union representation might no longer be needed." *Tower Enterprises, Inc.,* 182 NLRB 382, 387; accord, *Skaggs Drug Centers, Inc.,* 197 NLRB 1240; *Honolulu Sporting Goods Co.,*

Ltd., 239 NLRB No. 173. It seems clear that this group of unfair practices would impress the Board as being beyond the curative powers of customary notice-posting, especially since the unlawful effects of the increases "cannot easily be erased, for the benefit remains in effect," *Red Barn System, Inc.*, 224 NLRB 1586. As to the two post-election grants of benefits, moreover, one of them given only shortly before this hearing began, the words of the Board in *Tipton Electric Company*, 242 NLRB No. 36, sl. op. p. 4, are apposite:

> Here, the Respondents' postelection grant of benefits rewarded employees for rejecting a union which the Respondents had earlier portrayed as a divisive force which would destroy harmonious working relationships. It is a calculated application of the carrot and the stick to condition employee response to any union organizing effort and affords the Respondents an unlawfully acquired advantage in regard to a rerun election which cannot be cured by simply ordering them to mend their ways in the future and post a notice.

The other unlawful acts earlier found would, I believe, tend to have a lingering coercive impact on the decision by employees whether to opt for the Union: the September 26 threat to Nancy McDaniel of withholding direct relationships with employees in the event of a Union victory; the restriction of Bolding and McDaniel in October; the threats to Baugher on October 22 that Union leaders and Baugher would be eliminated; the threat of a plant shutdown, of employees being fired, of her husband's job being in jeopardy, of an anticipatory refusal to bargain, and the promise of benefits, made to Betty Figgins in October and November; the threat of discharge to himself and others, and the threat of blacklisting, made to William Figgins on October 17, and the unlawful harrassment of Figgins prior to the election;

the improper promises of benefit made to Dillon in November by Gehring and Gottlieb; and, of course, the wrongful discharge of Bolding, a premier Union activist, in November.

In the Board's view, coercive statements take on a life of their own, in that they are apt to be repeated to other employees by the ones who hear them. *General Stencils, Inc.*, 195 NLRB 1109, 1110, and cases cited at n. 5. More concrete, however, is the fact that, as a result of this proceeding, which presumably will receive considerable publicity at the plant, it has been and will be brought home, not only to 1977 employees but also to 1979 ones, that Respondent's agents manifested a willingness to violate the law in order to keep the union out.[77] That knowledge would tend both to dampen the enthusiasm of employees for the Union in the polling booth and to inhibit prudent employees from participating in the important work of preelection proselytizing for the Union. The abrupt disappearance of Bolding, a notable Union adherent, from the payroll a month before the election has likely had a seriously sobering effect upon the employees; the potential of his reinstatement to work several years thereafter would not be a very consoling prospect to employees pondering whether to involve themselves in a renewed effort to elect the Union.

The circumstances lead me to believe that a bargaining order would be appropriate here. The Union amassed a most respectable showing in the December 1977 election, but it seems fair to attribute, at least in part, the loss of card support, which would have made the difference, to the unfair labor practices committed. The two general wage increases given after the election may well have chilled

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[77] It seems proper to hold Respondent accountable for the reputation it will garner among the employees from this legal proceeding as a foreseeable consequence of its unlawful conduct.

any chance for the Union to maintain even the support it rallied at the 1977 polling. While the notion of holding a rerun election trips easily off the tongue, it should be recognized that the Union and its adherents committed 2½ months of time and effort to the 1977 election and would now have to undertake a repetition of both those labors and the expense involved. In view of the number of cards collected by the Union in 1977, it is a sound inference that if Respondent had conducted a lawful campaign, the Union might well today be the cerified representative of the employees.[78]

The combination of a strong showing of employee desire for union representation and the probable enduring effects of the unfair practices indicates that "perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign." *Gissel Packing Company*, at p. 612. The remedy is a meaningful, but not harsh, one: "There is, after

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[78]While it relates to no specific complaint allegation, I have considered as background the preelection literature distributed by the Respondent. Some of it is pretty strong stuff, particularly a November 16 letter, attaching "a list of Viriginia firms that have closed their doors. . . . They are out-of-business for one reason or another. *Each firm listed was unionized*, some you know about already such as *Virginia Metal Products* where 450 jobs were lost, or *Clarostat* where 180 jobs were lost. There are other firms listed that you should be equally interested in because they had the same union that is trying to get in here. Your decision on how you will vote in this election is extremely important. We encourage you to vote 'NO' and help us defeat the union." (Emphasis in original.) The attached list of 40 closed union firms is headlined "The Union Can't Guarantee The Most Important Thing You Have—Your Job." Because a job usually *is* "the most important thing" an employee has, particularly in small towns, this kind of reckless and undiscriminating association of unions and defunct businesses can often convey a most serious message to employees.

all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition." *Id.*, at p. 613.

D. The Election Issues

As stated above, I conclude that the ballots of the 18 employees previously discussed should be opened and counted.

The Regional Director has also referred to me for determination Petitioner's Objections 3 and 4 to conduct assertedly affecting the December 1977 election. Since I have concluded that Respondent violated the Act by conduct alleged in the objections,[79] and since conduct violative of the Act is, *a fortiori,* conduct which interferes with the exercise of free choice in an election, *Dal-Tex Optical Company,* 137 NLRB 1782, 1786,-1787, I shall recommend that, assuming the opening of the ballots do not determine the election in the Union's favor, the election be set aside.

Conclusions of Law

1. Respondent, Gordonsville Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Stephen Bolding on November 8, 1977, Respondent violated Section 8(a)(3) and (1) of the Act.

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[79] I do not find, however, as claimed in the objections, that Respondent wrongfully discharged Nancy McDaniel.

4. By, in September, October, November, and December, 1977, and June 1978, conducting a survey, and, in other ways, expressly and impliedly promising to rectify employee grievances and to grant benefits; threatening employees with loss of benefits, loss of jobs, blacklisting, plant closure, and a refusal to bargain in the event of a Union election victory; restricting and harassing employees; interfering with Board processes by attempting to influence the testimony of employees in Board proceedings; granting wage increases; and announcing the existence of a profit-sharing plan, Respondent violated Section 8(a)(1) of the Act.

5. The appropriate unit for collective bargaining is:

> All production and maintenance employees employed by Respondent at its Gordonsville, Virginia, location, but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

6. By refusing, on and after September 27, 1977, to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the unit described above, Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Except as set out above, Respondent has not violated the Act in any other respect alleged in the complaints.

The Remedy

I shall recommend that Respondent be required to recognize and bargain collectively with the Union. I am aware, of course, of the theoretical chance that counting the un-

opened ballots may result in certification of the Union as the bargaining representative. The Board has recently held it appropriate to award a bargaining order in situations where it was possible that union election victories would also occur; I cannot distinguish those cases from this one. *Pope Maintenance Corporation,* 228 NLRB 326, 348; *The Great Atlantic & Pacific Tea Company,* 230 NLRB 766, 767-768.

Having found that Respondent unlawfully discharged Stephen Bolding on November 8, 1977, I shall recommend that it be ordered to offer Bolding immediate and full reinstatement, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered from November 8, 1977, to the date of Respondent's offer of reinstatement, with interest, in accordance with *F. W. Woolworth Company,* 90 NLRB 289, and *Florida Steel Corporation,* 231 NLRB 651.[88]

I shall also recommend that Respondent be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[89]

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[88]See, generally, *Isis Plumbing & Heating Company,* 138 NLRB 716.

[89]In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Gordonsville Industries, Inc., Gordonsville, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively in good faith, upon request, with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC ("the Union"), as the exclusive bargaining representative of all employees in the appropriate unit set forth in Paragrah 5 of the Conclusions of Law herein with respect to rates of pay, hours, and other terms and conditions of employment.

(b) Discharging or otherwise discriminating against employees because of any activities on behalf of the Union, or any other labor organization.

(c) Threatening employees, for assisting or supporting the Union or any other labor organization, with loss of benefits, loss of jobs, blacklisting, plant closure, or a refusal to bargain; promising or granting benefits to employees to induce them to refuse to support the Union or any other labor organization; and interfering with Board processes by attempting to influence the testimony of witnesses.

(d) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining or other mutual aid, or to refrain from any and all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Stephen Bolding immediate and full reinstatement to his former job, or, if that job no longer

exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Recognize, effective September 27, 1977, and, upon request, bargain collectively with the Union, as the exclusive representative of the employees in the appropriate unit set forth above, with respect to rates of pay, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Preserve, and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payroll records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of backpay due.

(d) Post at its place of business in Gordonsville, Virginia, copies of the attached notice marked "Appendix B."[90] Copies of the notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[90]In the event the Board's Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of the receipt of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that those portions of the complaints found to be without merit are hereby dismissed.

IT IS FURTHER ORDERED that the ballots as described in the foregoing Decision be opened and counted, and a revised tally of ballots be issued, and, if necessary, the election conducted in Case 5-RC-10242, on December 6, 1977, be, and it hereby is, set aside.

Dated, Washingon, D. C. November 8, 1979

(s) Bernard Ries
Administrative Law Judge

APPENDIX A

VALID CARDS BY DAY OF EXECUTION

G.C. Exh.	9/18 (20)	G.C. Exh.	9/19 (50)	G.C. Exh.	9/20 (51)
14	A. Henry	9	D. Fletcher	17	K. Brown
73	M. Runion	15	D. Stanley	23	C. Dowell
80	S. Roach	16	P. Shifflett	28	E. Gardner
82	E. Williams	18	M. Dean	29	E. Lettner
104	J. Collins	20	E. Rogers	31	D. Davis
105	D. Lamb	21	C. Rogers	35	C. Chandler
120	T. Dickerson	22	R. Rogers	37	Lewis Davis
126	E. McAllister	24	S. Beck	42	W. Nash
143	N. McAllister	25	R. Brown	43	D. Moubray
147	W. Figgins	38	E. Colvin	44	S. Robinson
148	Cecil Dollins	53	E. Mitchell	45	D. Branham
149	T. Kestner	54	C. Pritchett	46	I. Madison
150	S. Riner	61	N. Martin	48	R. Snow
151	P. Seeds	62	L. Lawrence	49	L. Cox
186	J. McDaniel	63	N. Sacre	52	J. Hughes
178	R. Miller	64	A. Thomas	55	K. Johnson
198	C. Morris	66	K. Brown	56	Wm. Jenkins
199	Wm. Taylor	85	C. Shelton	57	R. O. Brown
200	Wm. Shifflett	97	H. Richardson	59	S. Morris
204	Wm. Martin	99	C. Breeden	60	Wm. Morris
		100	J. Miller	67	W. Timmons
		106	J. Lamb	68	M. Timmons
		107	D. Bell	71	S. Carter
		108	G. McIntosh	75	D. Berry
		109	A. Brown	81	M. Roach
		113	C. Quann	86	Wm. Rogers
		117	M. Bell	110	L. Nicholas
		118	B. Figgins	112	G. Cooper
		127	T. Dillon	116	C. Smith
		128	D. Long	122	D. Peregoy
		129	E. Williams	123	S. Bolding
		130	H. Williams	132	J. Dunnivan
		131	B. Miller	133	C. Miller

(continued on next page)

APPENDIX A (Continued)

G.C. Exh.	9/18 (20)	G. C. Exh.	9/19 (50)	G. C. Exh.	9/20 (51)
		152	B. Bibb	134	T. Jackson
		153	E. Daugherty	135	G. B. Miller
		154	W. Dabney	136	C. Dove
		155	Ern. Williams	144	D. Foley
		156	Edna Williams	162	I. Cowherd
		157	A. Shifflett	164	A. Fotusky
		158	D. Seal	166	M. Watson
		159	E. Proffitt	167	M. Winston
		160	A. Morris	179	P. Wood
		161	J. Mitchell	184	P. Johnson
		180	A. Anderson	192	M. Davis
		195	H. Morris	193	B. Estes
		201	S. James	194	E. Beasley
		202	M. Dollins	205	L. Martin
		203	D. Lewis	213	E. Shifflett
		212	R. Wilson	214	R. Winkey
		235	V. Racer	215	S. Winkey
				234	C. Sparks

G. C. Exh.	9/21 (12)	G. C. Exh.	9/22 (13)	G. C. Exh.	9/23 (11)
19	M. Harlow	34	B. Cooke	27	D. Gallihugh
58	R. Brown	76	H. Marks	87	G. Glazebrook
83	Wm. Brockman	77	F. Marks	89	D. Lettner
92	J. Shifflett	85	J. Stanley	90	M. Rollins
95	G. Shifflett	98	H. Riner, Jr.	115	M. Seale
137	S. Carter	102	R. Baker	142	E. Gipson
138	J. Shipp	139	E. Richards	175	C. White
174	R. Lam	140	E. Ferrell	185	G. Haney
189	E. J. Cromer	141	R. Bowler	206	B. Hughes
190	E. Ellis	145	A. Lawrence	207	E. Daugherty
191	L. Perkins	177	P. Taylor	258	E. Collins
255	J. Franck	217	R. Nixon		
		13	B. Smith		

(continued on next page)

APPENDIX A (Continued)

G. C. Exh.	9/24 (1)	G. C. Exh.	9/25 (4)	G. C. Exh.	9/26 (3)
208	R. Martin	10	L. Howley	26	D. Ables
		39	F. Eury	74	M. Graves
		121	Q. Collier	209	C. Holland
		146	F. Baugher		

G. C. Exh.	9/27 (5)	G. C. Exh.	9/28 (2)	G. C. Exh.	9/29 (24)*
30	D. Davis	79	L. Hoffman	36	J. Chander
181	E. Sprouse	94	C. Dickerson	41	D. Shifflett
182	M. Herndon			78	D. Douglas

G. C. Exh.	9/27 (5)	G. C. Exh.	9/28 (2)	G. C. Exh.	9/29 (24)
196	M. Carter			91	H. B. Riner, Sr.
11	G. Ellis			111	Wm. Richards
				119	K. Garnett
				183	J. Estes
				211	H. Bostic
				48	S. Snow
				33	M. Carter
				70	W. Bryant
				101	R. Sacre
				40	M. Mitchell
				65	C. Hunt
				163	V. Hagens
				165	R. Powell
				210	W. Simmons
				216	M. Pritchette
				125	W. Rollins
				259	J. Greene
				93	M. Marshall

*Included here are the 22 cards which were signed prior to September 29, but the dates of which are uncertain.

(continued on next page)

APPENDIX A (Continued)

G. C. Exh.	9/27 (5)	G. C. Exh.	9/28 (2)	G. C. Exh.	9/29 (24)
				96	B. Shipley
				168	A. Perkinson
				169	C. Lucas

G. C. Exh.	9/30 (3)	10/1	10/2
103	C. Anderson		
114	M. Carpenter		
254	R. Miller		

G. C. Exh.	10/3 (2)	10/4	10/5
88	D. Taylor		
173	C. Johnson		

Form NLRB—4727 (9-69) Appendix B JD-787-79

[SEAL] NOTICE TO EMPLOYEES [SEAL]

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a Trial in Which All Sides Had a Chance to Give Evidence, the National Labor Relations Board Has Found That We Violated the National Labor Relations Act and Has Ordered Us to Post This Notice.

We intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization;

To form, join, or help unions;

To bargain collectively through representatives of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all these things.

We Will Not discharge or otherwise discriminate against any employees to discourage membership in Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC ("the Union"), or any other labor organization.

We Will Not threaten employees with loss of benefits, loss of jobs, blacklisting, plant closure, or a refusal to bargain, or promise or grant benefits to employees, in order to affect their support for the Union or any other labor organization.

We Will Not interfere with Board processes by attempting to influence the testimony of witnesses in Board proceedings.

We Will bargain, upon request, with the Union as the exclusive collective-bargaining representative of all employees in the following unit:

All production and maintenance employees at our Gordonsville, Virginia, plants, but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

We Will offer Stephen Bolding immediate and full reinstatement to his former job and We Will compensate him with interest for any loss of pay he may have suffered because we terminated him.

Gordonsville Industries, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9100 Edward A. Garmatz Federal Building & Court House, 101 W. Lombard St., Baltimore, Maryland 21201—(301) 962-2915.

APPENDIX E

SUBPOENA DUCES TECUM B-176150

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Gordonsville Industries, Inc.,
295 - 5th Avenue, New York, NY 10016

Request therefor having been duly made by Joseph J. Baniszewski, Counsel for the General Counsel, whose address is 9100 Garmatz Federal Building, Baltimore, Maryland

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge of the National Labor Relations Board, at Moot Court Room, School of Law, University of Virginia in the City of Charlottesville, Virginia, on the 24th day of July, 1978, at 10 o'clock a.m. of that day, to testify in the Matter of Gordonsville Industries, Inc., (and day to day thereafter until released) Cases 5-CA-9050, 5-CA-9308, 5-RC-10242.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHED PAGES FOR SUBPOENAED MATERIALS

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at Baltimore, Maryland this 11th day of July, 1978.

[SEAL] (s) John H. Fanning

ATTACHMENT

1. Payroll records covering the period December 1, 1974, to January 31, 1978, showing the names, job classifications, departments, rates of pay, changes in rates of pay, dates of changes in rates of pay, amounts of changes in rates of pay, dates of hire, termination or layoff, hours of employment, and dates of all promotions and changes in job classifications, for all individuals employed by Gordonsville Industries, Inc., at its Gordonsville, Virginia, location.
2. Letters, posters, circulars, memoranda, or other records or documents, covering the period December 1, 1974, to January 31, 1978, announcing or otherwise publicizing wage increases for individuals employed by Gordonsville Industries, Inc., at its Gordonsville, Virginia, location.
3. Letters, memoranda, surveys, records or other documents concerning the rates of pay, wages and other benefits provided to employees of other employers, that were received or otherwise obtained by Gordonsville Industries, Inc., for its Gordonsville, Virginia, plant, during calendar year 1977.
4. Letters, memoranda, reports, minutes of directors meetings, minutes of shareholders meetings, managerial reports, or other records or documents concerning wage increases for individuals employed by Gordonsville Industries, Inc., for its Gordonsville, Virginia, location, covering the period December 1, 1974, to January 31, 1978.
5. Evaluation forms, notes, memoranda, or other reports or records, covering the period December 1, 1974, to January 31, 1978, used by Gordonsville Industries, Inc., to evaluate or otherwise assess the work performance of all individuals employed by Gordonsville Industries,

Inc., at its Gordonsville, Virginia, location, showing the date of the evaluation, the name of the individual being evaluated, the job classification of the person being evaluated, the name and title of the person conducting the evaluation, the name and title of the person reviewing the evaluation, and the results of the evaluation.

6. Copy of all rules governing employee conduct in effect at Gordonsville Industries, Inc.'s Gordonsville, Virginia, plant, during the period September 1, 1977 to December 31, 1977.
7. Books, records, or other documents showing the names of all persons of Gordonsville Industries, Inc.'s Gordonsville, Virginia, plant, who were disciplined (by warning, reprimand, suspension, or discharge) during the period January 1, 1975, to December 31, 1977, and showing the nature of the discipline imposed and the reason why the discipline was imposed.
8. Personnel files of all persons employed by Gordonsville Industries, Inc., at its Gordonsville, Virginia, plant, who were discharged during the period January 1, 1975, to December 31, 1977.
9. All federal withholding tax (W-4) forms signed by all persons who were employed at Gordonsville Industries, Inc.'s Gordonsville, Virginia, plant, during the period September 1, 1977, to January 1, 1978.
10. Original letter dated September 23, 1977, from Bruce Dunton, of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, to Gordonsville Industries, Inc., Gordonsville, Virginia, requesting recognition as bargaining agent on behalf of Gordonsville Industries, Inc.'s production and maintenance employees.
11. True copy of letter dated September 27, 1977, from Gordonsville Industries, Inc., signed by Gary Miller, plant manager, to Bruce Dunton, acknowledging re-

ceipt of the request for recognition as bargaining agent made by Amalgamated Clothing and Textile Workers Union, AFL-CIO.

12. Copies of reports, analyses, summaries, charts, graphs, findings, recommendations and other documents received from Personnel Opinion Surveys, Inc., Bristol, Tennessee, as a result of the employee opinion survey conducted by Personnel Opinion Surveys, Inc., among persons employed by Gordonsville Industries, Inc., at its Gordonsville Virginia, location, on or about September 26, 1977.
13. Copies of all letters, leaflets or other materials mailed to, or otherwise distributed to, persons employed by Gordonsville Industries, Inc., at its Gordonsville, Virginia, plant, during the period September 1, 1977, to date, concerning the organizational activities of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, at Gordonsville Industries, Inc.
14. Copies of all posters, notices or other materials posted or otherwise displayed at Gordonsville Industries, Inc.'s Gordonsville, Virginia plant, during the period September 1, 1977, to date, concerning the organizational activities of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, at Gordonsville Industries, Inc.
15. Copies of all written instructions which were issued by Gordonsville Industries, Inc. during the period September 1, 1977, to December 31, 1977, to its supervisors regarding union organizational activity at its Gordonsville, Virginia, plant.
16. Unfair labor practice charge (Form NLRB-501) in Case 5-CA-9308, dated on or about March 16, 1978.
17. Original letter dated on or about October 21, 1977, from Stephen Bolding to Gordonsville Industries, Inc.,

in care of Gary Miller, Plant Manager, regarding the signatures upon and the purpose of an employee circular concerning the organizational activities of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, at Gordonsville Industries, Inc.

18. True copy of a letter, dated on or about October 19, 1977, from Gordonsville Industries, Inc., signed by Gary Miller, Plant Manager, addressed to employees of Gordonsville Industries, Inc., regarding the signatures upon and the purpose of an employee circular concerning the organizational activities of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, at Gordonsville Industries, Inc.

19. True copy of a letter, dated on or about November 8, 1977, from Gordonsville Industries, Inc., signed by Gary Miller, to Stephen Bolding, regarding Stephen Bolding's termination from the employment of Gordonsville Industries, Inc.

20. Original charge, statement or written description made by Russell Wingfield and given to Gordonsville Industries, Inc., regarding an allegation of an incident of assault occurring on or about November 8, 1977, involving Russell Wingfield and Stephen Bolding, and all subsequent statements, reports, or other accounts of the alleged November 8, 1977, incident of assault made by Russell Wingfield and given to Gordonsville Industries, Inc.

21. Original statement or other written account of the alleged November 8, 1977, incident of assault between Russell Wingfield and Stephen Bolding made by any individuals(s) and given to Gordonsville Industries, Inc.

22. True copy of the statement, report, or other written document provided by Gordonsville Industries, Inc., to

the Virginia Employment Commission, signed by Gary Miller, on or about November 14, 1977, regarding the claim for unemployment compensation benefits filed by Stephen Bolding, and all subsequent statements, reports or other written documents provided by Gordonsville Industries, Inc., to the Virginia Employment Commission regarding the claim for unemployment compensation benefits filed by Stephen Bolding.

23. Books, records, or other documents showing the names of persons employed by Gordonsville Industries, Inc., at its Gordonsville, Virginia, plant, who were accused of assaulting, verbally or physically, other persons employed by Gordonsville Industries, Inc., and showing the dates of the assault, the names of the accuser(s), statements, reports or charges given by the accuser(s) and witnesses, and the action taken by Gordonsville Industries, Inc., regarding the accusation and the employment status of the person accused.

24. Payroll records, personnel records or other documents showing the names of all persons classified as mechanics during the period June 1, 1976, to December 1977, showing the dates of hire, dates of promotion within the mechanic classification, effective dates of wage increases, rate of pay at each classification, evaluation or other record of performance within the mechanic classifications, and recommendations for promotions within the mechanic classification or to other positions within Gordonsville Industries, Inc., at its Gordonsville, Virginia, plant.

25. Original file memorandum, dated on or about November 28, 1977, by Gary Miller, regarding Stephen Bolding, concerning the termination of Stephen Bolding.

26. True copy of the letter dated on or about October 25, 1977, from Gordonsville Industries, Inc., signed by Pat

McKeown, to Nancy McDaniel, regarding her employment with Gordonsville Industries, Inc., an assignment of work to Nancy McDaniel and her discharge from Gordonsville Industries, Inc.

27. Original letter dated on or about October 26, 1977, to Pat McKeown from Nancy B. McDaniel, in response to Pat McKeown's letter to Nancy B. McDaniel dated October 25, 1977, regarding assignment of work.

28. True copy of the letter dated on or about October 28, 1977, from Gordonsville Industries, Inc., signed by Pat McKeown, to Nancy McDaniel, regarding Nancy McDaniel's employment with Gordonsville Industries, Inc.

29. Original telephone switchboard operators' log book maintained by telephone switchboard operators at Gordonsville Industries, Inc. at its Gordonsville, Virginia, plant, during the period August 1, 1977, to December 31, 1977.

30. True copy of the statement, report or other written document provided by Gordonsville Industries, Inc., to the Virginia Employment Commission, on or about November 1, 1977, regarding the claim for unemployment compensation benefits filed by Nancy Bell McDaniel, and all subsequent statements, reports or other written documents provided by Gordonsville Industries, Inc., to the Virginia Employment Commission regarding the claim for unemployment compensation benefits filed by Nancy Bell McDaniel.

31. Copy of handbill, bearing signatures of individuals identifying themselves as Gordonsville Industries In Plant Organizing Committee, circulated at Gordonsville Industries, Inc., at its Gordonsville, Virginia, plant, on or about October 1, 1977.

When used in this subpoena, the terms documents or document refer to all materials whether printed, recorded,

or reproduced by any mechanical means or process, or written by hand or produced by hand, and include: agreements, letters, communications, correspondence, telegrams, memorandum, records, books, summaries of records of telephone conversations, summaries of records of personal conversations or interviews or meetings, diaries, calendars, accountants' or bookkeepers' work papers, minutes, records of meetings or conference reports and/or summaries or notice of interviews, memoranda, drafts, working papers, contracts and the like.

In lieu of physically producing the information and/or data required above at the aforesaid hearing, Counsel for the General Counsel will accept an affidavit duly executed by a responsible official(s) or representative(s) of Gordonsville Industries, Inc., incorporating the aforesaid information and/or data provided, however, that the Counsel for the General Counsel is permitted to photostat and/or copy whatever original documents in the possession of the said Gordonsville Industries, Inc., as are necessary to adequately present this evidence in this matter.

APPENDIX F

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

FIFTH REGION

GORDONSVILLE INDUSTRIES, INC. and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC	Case Nos. 5-CA-9050 5-CA-9308 5-RC-10242

PETITION TO REVOKE

On or about July 13, 1978, the Subpoena Duces Tecum, a copy of which is attached as Exhibit A, was served upon the Respondent herein and upon "Liberty Fabric of New York."

The undersigned attorney for the parties upon which said Subpoena was served hereby on behalf of his clients petitions the Board to revoke, in whole or in part, said Subpoena(s) Duces Tecum on the following grounds:

A. All or part of the evidence, the production of which is sought or required, does not relate to any matter under investigation.

B. All or part of the evidence whose production is sought or required does not relate to any matter in question in the instant proceedings.

C. All or part of the evidence whose production is sought or required is not described with sufficient particu-

larity to enable the parties upon which said Subpoenas were served to identfy the items, if any, whose production is sought.

D. Compliance with the Subpoenas as presently constituted is onerous, burdensome, oppressive and expensive, and the enforcement thereof would impose a burden upon the Respondent without any concomitant benefit to general counsel, and the materials sought are in no way necessary or a basic part of general counsel's case.

In considering whether or not each of the 31 subpoenaed items is a relevant and otherwise properly subpoenable item, the burden is on general counsel to show that the subpoena is proper and within the scope of Section 11 of the Act and Section 102.31 of the Rules and Regulations of the Board since Respondent does not at this time know the basis of general counsel's desire for each of the 31 items. Due process, the Administrative Procedure Act and the National Labor Relations Act require that the reasons (now known only to general counsel) why each item is alleged to be relevant or otherwise subpoenable should be disclosed to the Board and to the Respondent. Respondent should then have the opportunity after learning said reasons to made a response. *See* Section 11 of the Act and Section 102.31 of the Rules and Regulations of the Board.

E. Statements given and memoranda written by prospective witnesses or other persons to a respondent in a case brought under Sections 8 and 10 of the National Labor Relations Act are privileged and not subject to discovery or delivery pursuant to Subpoena or request, for the same reasons and in the same manner that such statements are privileged or not subject to discovery, delivery or disclosure in the hands of the Board. *See* N.L.R.B. v. Robbins Tire & Rubber Co., No. 77-911, June 15, 1978.

It is requested that this Petition to Revoke, any answer thereto and all rulings thereon be made a part of the official record herein.

Respectfully submitted,

John S. Greenebaum
25th Floor
First National Tower
Louisville, Kentucky 40202
(502) 589-4100

Attorney for Respondent

July 14, 1978

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition to Revoke has been served by first-class mail, postage prepaid, upon the following persons at the addresses listed below, this 14th day of July, 1978:

Amalgamated Clothing and Textile Workers
Union, AFL-CIO, CLC
Attn: Robert J. Bach, Esquire
15 Union Square
New York, N. Y. 10003

Amalgamated Clothing and Textile Workers
Union, AFL-CIO, CLC
Attn: Mr. Harold Boch, Union Representative
1126 - 16th Street, N. W., Room 410
Washington, D. C. 20036

Thomas N. Kessel, Esquire
Chief Administrative Law Judge
National Labor Relations Board
1231 - 25th Street, N. W.
Washington, D. C. 20037

William A. Lubbers, Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

John S. Greenebaum

APPENDIX G

SUBPOENA DUCES TECUM B-138020

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Joseph J. Baniszewski, Counsel for the General Counsel, NLRB
9100 Garmatz Federal Building
Baltimore, Maryland

Request therefor having been duly made by John S. Greenebaum, Counsel for Respondent in cases set out below, whose address is 25th Floor, First National Tower, Louisville, Kentucky 40202.

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge of the National Labor Relations Board, at Moot Court Room, School of Law, University of Virginia in the City of Charlottesville, Virginia on the 28th day of July, 1978, at 10 o'clock a.m. of that day and thereafter until released to testify in the Matter of Gordonsville Industries, Inc., Cases 5-CA-9050 and 5-CA-9308.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHED PAGE FOR SUBPOENAED MATERIALS

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at _____ this _____ day of _____, 19____

[SEAL] (s) John H. Fanning

NOTICE TO WITNESS.—Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subponaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

SHEET ATTACHED TO SUBPOENA B-138020

1. Statements, questionnaires, memoranda or documents signed by any past or present employee of Respondent alleged by General Counsel to have signed a "union card" similar in form to General Counsel's Exhibit 11 relating to his or her execution, receipt or delivery of such card or to execution, receipt or delivery of the card of any other past or present employee of Respondent.
2. Statements, questionnaires or documents signed by a) any person who has been or may be a witness in the instant proceeding, or b) any other person, relating to the allegations of the complaint herein (other than internal Board communications).
3. Any documents referred to in items 1 and 2 above.

The term "documents' 'as used herein has the same definition as in Board Subpoena B-176147 served in the instant proceeding.

SUBPOENA DUCES TECUM B-178704

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Thomas W. Ross and Michael K. Curtis of Smith, Patterson, Follin, Curtis, James & Harkavy, Attorneys for Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC
704 Southeastern Building,
Greensboro, North Carolina

Request therefor having been duly made by John S. Greenebaum, Counsel for Respondent in cases set out below, whose address is 25th Floor, First National Tower, Louisville, Kentucky 40202.

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge of the National Labor Relations Board, at Darden School of Business hearing room, University of Virginia in the City of Charlottesville, Virginia on the 10th day of August, 1978, at 4:00 o'clock p.m. of that day and thereafter day by day until released to testify in the Matter of Gordonsville Industries, Inc., Cases 5-CA-9050, 5-CA-9308 and 5-RC 10242.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHED PAGES FOR SUBPOENAED MATERIALS

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at Charlottesville, Virginia, this 10th day of August, 1978.

[SEAL] (s) John H. Fanning

ATTACHMENT TO SUBPOENA B-178704

1. Copies of all statements, records, letters, memoranda and other documents given to the National Labor Relations Board by the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC (hereinafter referred to as the "Union") or in the Union's possession relating to Cases 5-CA-9050, 5-CA-9308 and 5-RC-10242.
2. Copies of all statements, questionnaires, memoranda or documents signed by any past or present employee of Respondent alleged by the Union to have signed a "Union card" similar in form to General Counsel's Exhibit 11 relating to his or her execution, receipt or delivery of such card or to execution, receipt or delivery of the card of any other past or present employee of Respondent.
3. Copies of all statements, questionnaires, memoranda or documents signed by (a) any person who has been or may be a witness in the instant proceedings, or (b) any other person, and given to the Board or to the Union, in connection with (a) all allegations contained in the Complaint; (b) the Objections filed in Case 5-RC-10242; and (c) questions of eligibility in Case 5-RC-10242.
4. Copies of all documents referred to in the statements, questionnaires, memoranda or documents referred to in #2 & #3 above.
5. Copies of all letters, memoranda, records, statements or other documents in the Union's files or otherwise in the Union's possession concerning termination, resignation, notice of termination, notice of resignation, or other changes in the terms and conditions of employment of Patricia Hess, Stephen Bolding, Nancy McDaniel and Ray Carpenter.

6. Copies of all statements, memoranda, records, letters, written accounts and other documents and information given to the Union or otherwise in the Union's possession, including any made by any individual(s) and given to the Union, pertaining to: (a) an incident of assault occurring on or about November 8, 1977, involving Russell Wingfield and Stephen Bolding; or (b) the termination of Stephen Bolding by Gordonsville Industries, Inc. on or about November 8, 1977.

7. Copies of all statements, memoranda, records, letters, written accounts and other documents and information given to the Union or otherwise in the Union's possession, including any made by any individual(s) and given to the Union, pertaining to: (a) an incident involving the refusal by Nancy McDaniel of a legitimate work assignment on or about October 25, 1977; (b) the termination of Nancy McDaniel by Gordonsville Industries, Inc. on or about October 25, 1977; or (c) the refusal by Gordonsville Industries, Inc. to reinstate Nancy McDaniel on or about October 28, 1977.

8. Copies of all letters, posters, circulars, leaflets, or other materials, records or documents mailed to or otherwise distributed to persons employed by Gordonsville Industries, Inc. at its Gordonsville, Virginia plant, during the period September 1, 1977 to date, concerning the organizational activities of the Union at Gordonsville Industries, Inc.

9. Copies of all posters, notices or other materials posted or otherwise displayed at Gordonsville Industries, Inc.'s Gordonsville, Virginia plant, during the period September 1, 1977 to date, concerning the organizational activities of the Union at Gordonsville Industries, Inc.

10. Copies of all written instructions issued by the Union to its solicitors, representatives and agents during the period September 1, 1977 to December 31, 1977, regarding Union organizational activity at the Gordonsville, Virginia plant of Gordonsville Industries, Inc.

The term "document" as used herein has the same definition as in Board Subpoena B-176147 served in the instant proceeding.

APPENDIX H

August 2, 1978

John S. Irving, General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: Gordonsville Industries, Inc. Cases Nos. 5-CA-9050, 5-CA-9308 and 5-RC-10242

Dear Sir:

On the 28th day of July, 1978, the undersigned attorney for the Respondent in the above matters served upon Joseph Baniszewski, Counsel for the General Counsel, in the above cases, a Subpoena Duces Tecum which sought to elicit certain materials, statements, questionnaires and documents for use by Respondent in the above proceedings. A copy of said Subpoena is attached as Exhibit A. A hearing in the above matters opened July 24, 1978 in Charlottesville, Virginia.

Also attached as Exhibit B is a copy of a comparable Subpoena served by Counsel for the General Counsel upon the Respondent. In connection with Exhibit B, Respondent has filed with the Board a Petition To Revoke attached hereto as Exhibit C and a Memorandum in Support attached hereto as Exhibit D.

The Board deferred Respondent's Petition To Revoke to the Honorable Bernard Reis, Administrative Law Judge, and the Administrative Law Judge on the record in said cases revoked said Subpoena of Counsel for the General Counsel in certain respects, but not in others. The text of

Judge Reis' Ruling is set out in the transcript of the proceedings now in the process of preparation.

In accordance with the provisions of Section 102.118 of the Rules and Regulations of the Board, the undersigned attorney for Respondent hereby requests that the General Counsel consent to the production of the documents sought to be produced in Exhibit A. The purposes of the production of such documents are the following:

(a) The materials sought in Exhibit A are relevant and comparable in scope to the materials sought by Counsel for the General Counsel in Exhibit B. To ask the production of materials sought in Exhibit B while denying Respondent at the same time access to the comparable materials sought in Exhibit A violates the equal protection and due process clauses of the Constitution and Section 559 of the Administrative Procedure Act. Arguments in support of this are more specifically set out in Exhibit D.

(b) In addition, the Administrative Law Judge has specifically suggested that the General Counsel consider the possibility of allowing to be made available to the Respondent copies of certain Board questionnaires signed by employees of Respondent who were alleged to have signed authorization cards. These questionnaires were sent to the employees by the Board in the course of CA case's investigation and were completed by employees and delivered (in some cases through the Union) to the Board. Both the Union and the Board solicited the completion of the questionnaires (stultifying a confidentiality defense). In those cases involving questionnaires executed by individuals whose cards were proved by solicitors rather than by direct testimony of the allegedly signing individual, the Administrative Law Judge has suggested that the Board consider making such questionnaires available to the Respondent. The Judge's reasons for suggesting such consideration are

set out in the transcript but may be summarized generally to be a suggestion that delivery of the questionnaires by General Counsel would expedite the hearing while not being protected by any duty of confidentiality, since proof of the fact of an employee's execution of a card, in affect, destroys the need for secrecy.

I would be very happy to provide such additional materials as you might need in connection with your consideration of this matter. The text of the transcript might also be considered. I also hereby request to be permitted to make an oral presentation to the General Counsel.

Your prompt consideration of the matters referred to herein would be appreciated.

Sincerely,
John S. Greenebaum

JSG/bd
Enclosures

APPENDIX I

P
[21126 EVDAA

RAAUIJAZ RUEVDEL0024 2232145-UUUU-RUEVDAA.
NLRB
Fm John Irving GC NLRB WSH DC
To John Greenbaum Esq First Natl Tower The Twentieth-Fifth Floor Louisville KY 40202
BT
Re Gordonsville Industries Inc
Case Nos 5 CA 9050; 5 CA 9308; 5 RC 10242

This is in response to your letter dated Aug. 2, 1978 in which you request, pursuant to Section 102.118 of the Board's Rules and Regulations, that permission be granted for Joseph Baniszewski, Counsel for the General Counsel, to produce certain materials, statements, and documents concerning the above-captioned case. Particularly, you refer to Questionnaires signed by employees of Respondent who signed authorization cards for the charging party.

It is the policy of the Office of the General Counsel to preserve the confidentiality of statements and records, including the names of prospective witnesses obtained in the course of our administrative investigation of unfair labor practice charges and representation cases, and to produce such material in Board proceedings only to the extent required by Section 102.118(B)(1), which provides that statements of witnesses called by the General Counsel are to be made available only after a witness has testified. N.L.R.B. v. Clement Brothers, 407 F. 2d 1027, 1031; Texas Industries, Inc., v. NLRB, 336 F. 2d, 1402, Cert. Denied, 368 U. S. 832;

NLRB v. Vapor Blast Manufacturing Co., 287 F. 2d 402, Cert. Denied 368 U. S. 832.

Page 2

Moreover, it has long been held that Section 10(B) of the act does not compel the Board to participate in or permit discovery during its Unfair Labor Practice Proceedings and the Board practice of denying such discovery has been uniformly upheld. N.L.R.B. v. Automotive Textile Products Co., Inc., 422 F. 2d 1255, 1256 (C.A. 6, 1970); Baser Tanning v. N.L.R.B., 276 F. 2d 80-83 (C.A. 6, 1960, Cert. Denied 363 U. S. 830; NLRB v. Interboro Contractors, Inc., 432 F. 2d 854, 858 (C.A. 2, 1970); McClain Industries Inc. v. NLRB., 521 F. 2d 596 (C.A. 6, 1974) 88 LRRM 2071; Theron's Country Store v. NLRB., (D.C. Ohio, 1974) 88 LRRM 2108; D'Youville Manor v. N.L.R.B., 526 F. 2d 3, 90 LRRM 3100 (C.A. 1, 1973); Barcelloneta Shoe Corp. v. Compton, 271 F. Supp. 591, (D.C.P.R.) Wellman Industries Inc. v. NLRB., 490 F. 2d 427, (C.A. 4, 1974), Cert. Denied, 43 LW 3199.

As regards your specific request for the production of certain Board questionnaires signed by employees of Respondent who were alleged to have signed authorization cards, the names and addresses of the card signers upon whom the General Counsel has

Page 3

relied in support of the complaint are available to your and such information may be used by you in the preparation of Respondent's position in this case. Of course, all statements of any witnesses called by the General Counsel or the charging party, including the questionnaires, will be made available where appropriate to Respondent pursuant to Section 102.118(B)(1) for the purpose of cross examination.

Under all the circumstances, I must deny your request for production of documents contained in the investigatory file. See Aero Corporation, 149 NLRB 1283, 1288. Cf. also Mercy College, 219 NLRB 81, 82. Robbins Tire Company, ____ U. S. ____ (1978).

BT

APPENDIX J

September 5, 1978

John S. Irving, General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: Gordonsville Industries, Inc. Cases Nos. 5-CA-9050, 5-CA-9308 and 5-RC-10242

Dear Sir:

Enclosed please find Respondent's Motion for Institution of Proceeding to Compel Obedience to Subpoenas Duces Tecum.

Through this Motion, Respondent respectfully requests that you institute proceedings on Respondent's behalf, in the United States District Court for the Eastern District of Virignia, for the enforcement of obedience to Subpoenas B-138019, B-138020 and B-178704 issued by the Board at our request.

You might consider instituting such enforcement actions in Cases Nos. 78-556-A and 78-557-A respectively, since the proper parties to those actions are already before the Court.

Sincerely,
John S. Greenebaum

JSG/bd
Enclosures

United States of America
Before the
NATIONAL LABOR RELATIONS BOARD
Fifth Region

Civil Nos. 5-CA-9050, 5-CA-9308 and 5-RC-10242

National Labor Relations Board - - - Applicant

v.

Gordonsville Industries, Inc. - - - Respondent

MOTION FOR INSTITUTION OF PROCEEDING TO COMPEL OBEDIENCE TO SUBPOENAS DUCES TECUM

The Respondent, Gordonsville Industries, Inc., by counsel, hereby moves the Board, through its General Counsel, to institute proceedings in the name of the Board and on relation of Gordonsville Industries, Inc., in the United States District Court for the Eastern District of Virginia, for the enforcement of obedience to Subpoenas B-138020, B-138019 and B-178704 issued by the Board at Respondent's request.

Respondent so moves the Board and General Counsel pursuant to the provisions of Section 11(2) of the National Labor Relations Act, as amended, and of Section 102.31(d) of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Board.

This ____ day of September, 1978.

Respectfully submitted,

Greenebaum, Treitz & Maggiolo

By: John S. Greenebaum

CERTIFICATE

This is to certify that a true and correct copy of the foregoing Motion for Institution of Proceeding to Compel Obedience to Subpoenas Duces Tecum was this ____ day of September, 1978, served by first-class mail on the following persons:

Thomas Ross, Esquire
Michael Curtis, Esquire
Smith, Patterson, Follin, Curtis,
James & Harkavy
704 Southeastern Building
Greensboro, North Carolina 27401

Joseph J. Baniszewski, Attorney
National Labor Relations Board
Region 5
9100 Garmatz Federal Building and Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Honorable Bernard Reis
Administrative Law Judge
National Labor Relations Board
1231 - 25th Street, N.W.
Washington, D.C. 20037

John S. Greenebaum

APPENDIX E

[21126 EVDAA

200910 R 0-06-01-033929

RAAUI JHZ RUEVDEL 0011 2622030-UUUU-RUEVDAA.

NLRB

Fm Roy Schoenfeld Div. of Operations Management Wsh DC

To RUEVDAA/2/ John S. Greenebaum Greenebaum, Teitz & Maggiola The Twenty-Fifth Floor First National Tower Louisville, Kentucky 40202

BT

Re: Gordonsville Industries, Inc. Case 5-CA-9050. 9308, RC-10242;

This is in response to your Motion for Institution of Proceeding to Compel Obedience to Subpoenas Duces Tecum in the above-entitled matters, filed with the General Counsel on September 5, 1978. For the reasons set forth below, your motion must be denied. With respect to the subpoenas served by you on Wm. E. Figgins (B-138019), a witness called by Counsel for the General Counsel, and on Joseph J. Baniszewski, Esq. (B-138020), Counsel for the General Counsel, both subpoenas were quashed by the Admin. Law Judge.

With Respoena served by you on Thomas W. Ross, Esq. and Michael K. Curtis Esq. (B-178704), Counsel for the charging party, the Admin. Law Judge revoked it in part and ordered that certain material be produced pursuant to

the subpoena on September 19, 1978, therefore, as to that subpoena your motion is premature. Accordingly, your entire motion must be and it hereby is, denied.

BT

NNNN
[21126 EVDAA

X

APPENDIX L

QUESTIONNAIRE

1. Your full and correct name: Nancy Ann Marks
2. Your current address: P.O. Box 213 Orange, VA 22960
3. Have you ever been employed by Gordonsville Industries, Inc. ☒ yes ☐ no
4. Your dates of employment at Gordonsville Industries, Inc.: (approximate dates, if necessary) from July - 77 to _____
5. If you are currently employed, please state your department and your immediate supervisor:
   Department: Mill E—Knitting Supervisor: Tom Pendleton
6. Did you sign the enclosed authorization card?
   ☒ yes ☐ no
7. Did you sign the card on the date shown?
   ☐ yes ☒ no
8. If you did not sign the card on the date shown, what date did you sign it? (Date) Nov.
9. Did you write the date on the card yourself?
   ☒ yes ☐ no
10. Who gave you the card? don't know
11. Who did you give it to after you signed it? don't know
12. Who was present when you signed the card? know one
13. When you signed the card were to told:
    it was for an election only ☒ yes ☐ no
    it was to authorize the union to represent me ☒ yes ☐ no
    it was for an election and to authorize the union to represent me ☒ yes ☐ no

14. Did you read the card before you signed it?

☒ yes ☐ no

15. I have completed this questionnaire and have answered each question to the best of my knowledge and belief.

(s) Nancy Ann Marks — June 8, 1978
Signature

APPENDIX M

EXCERPTS FROM TRANSCRIPTS

From page 368, lines 12-14:

Judge Ries: If the card solicitor authenticates the card that he is sponsoring, I think it would be appropriate to turn over the questionnaire.

From pages 390-391, beginning at 390, line 23:

Judge Ries: On the record.

Before you call your next witness, I want to say one thing. I have reconsidered my ruling on the point raised by Mr. Baniszewski and while I believe it would be beneficial to Respondent and probably helpful in the resolution of the issues in this case, to provide counsel for Respondent with the related questionnaires of card signers for whom witnesses testify. I doubt that I have authority, under the Board rules, to require General Counsel's to provide such questionnaires. I doubt that the Board would approve my doing so, so I am not going to require General Counsel to provide those questionnaires subsequently.

From page 556, lines 5-7:

Mr. Greenebaum [Counsel for Petitioner]: Do you have a statement from David Lamb?

Mr. Stanzler [Counsel for General Counsel]: Well, I wouldn't give it to you if I did, but I don't have it anyway.

From page 578, lines 14-22:

Mr. Greenebaum: Can I have Lillian Nicholas' questionnaire?

Mr. Stanzler: I have one, but I will not furnish it to you.

Your Honor, I would like to correct myself just for the sake of the record. I also have a questionnaire from Mr. David Lamb, but I will not furnish that to Counsel for the Respondent, either. I don't know if I stated that before or not.

From pages 2883-2888, beginning at page 2883, line 24:

Miss Kunk [Counsel for Petitioner]: Your Honor, General Counsel has just given us a copy of a questionnaire and we object to its being admitted or

2885

used at this time. It was subpoenaed by us and requested at the time the solicitor testified about this card and refused and for those purposes we would object to its being used at this time.

Judge Ries: I haven't seen any attempt to use it yet.

Mr. Stanzler: Well, I'm going to. It's uncontroverted that it was not produced because this gentleman's card was vouched for by a solicitor and this gentleman was not called by the General Counsel and hence we did not turn it over at the time of the testimony concerning this card. That was our consistent practice.

Judge Ries: Objection overruled.

Mr. Stanzler: I would like to have this marked for identification.

(The above-referred document was marked as General Counsels Exhibit No. 285 for identification.)

Judge Ries: You have an objection.

Q. (By Mr. Stanzler) Mr. Lamb, I'm going to show you a one page document that has been marked for identification as General Counsel's 285. I want you to look at it for a second.

Judge Ries: Mr. Lamb, can you read?

The Witness: Yes, sir. Slow. Went through seventh grade.

Judge Ries: You can read it a little bit?

The Witness: Sir.

Q. (By Mr. Stanzler) Have you had a chance to read it?

A. Yes, sir.

Q. Do you know what this is, Mr. Lamb?

2886

A. It's a questionnaire asking did I . . .

Q. Did you sign this?

A. Yes, I did.

Q. Did you fill out the rest of the questionnaire?

A. I did, sir.

Q. It's all in your handwriting?

A. Yes, sir.

Q. Was it true when you filled it out? Did you answer the questions truthfully when you filled it out?

A. I don't understand this one right here.

Q. No, wait a minute. To the best of your recollection, was it true when you filled it out?

A. Yes, sir.

Q. Now, I'm going to direct your attention to question number thirteen. Would you read it? Read it aloud please.

A. When you signed the card, were you told.

Q. Did you cross any boxes there? Did you make a mark in any of the boxes? It looks like you made a few marks, doesn't it?

A. Yes.

Q. And you crossed the boxes?

A. Yes.

Q. Saying it would authorize the union to represent me. Did you cross that box?

A. I did.

Q. And did you cross another box that says it was for an elec-

2887

tion and authorized the union to represent me, is that right?

A. I did.

Q. And did you cross no in response to where it says it was for an election only.

A. I marked yes.

Q. You marked yes for that? Take another look. Did you on this line where it says it was for an election only mark yes or no?

A. I marked no.

Mr. Stanzler: I think I will introduce into the record Exhibit 285.

Q. (By Mr. Stanzler) Mr. Lamb, do you remember what Mr. Collins told you about the card on the day that you signed it?

A. He came to the house and all he told me was, well, he asked me did I think it should be a change at the plant where I worked and I told him yes. He asked me if I would sign a card for the union to have an election and see if we could get enough signers to have an election.

That was all and I told him yeah and I signed the union card for him and he took it.

Q. Isn't it true that Mr. Collins told you at that time that you could sign a card in order to have the union represent you?

A. Not to my recollection, he did not.

Mr. Stanzler: No further questions.

Judge Ries: Did you move the admission of 285?

Mr. Stanzler: I did but I did not mean to, Your Honor.

2888

Judge Ries: You did not mean to?

Mr. Stanzler: I withdraw the offer, Your Honor.

Judge Ries: All right. Mr. Ross?

Q. (By Mr. Ross) Mr. Lamb, did you read that card before you signed it?

A. No.

Q. Did your wife read it to you?

A. No, sir.

Q. Did Mr. Collins read it to you?

A. No, sir.

Q. Did he tell you not to read it?

A. No, sir.

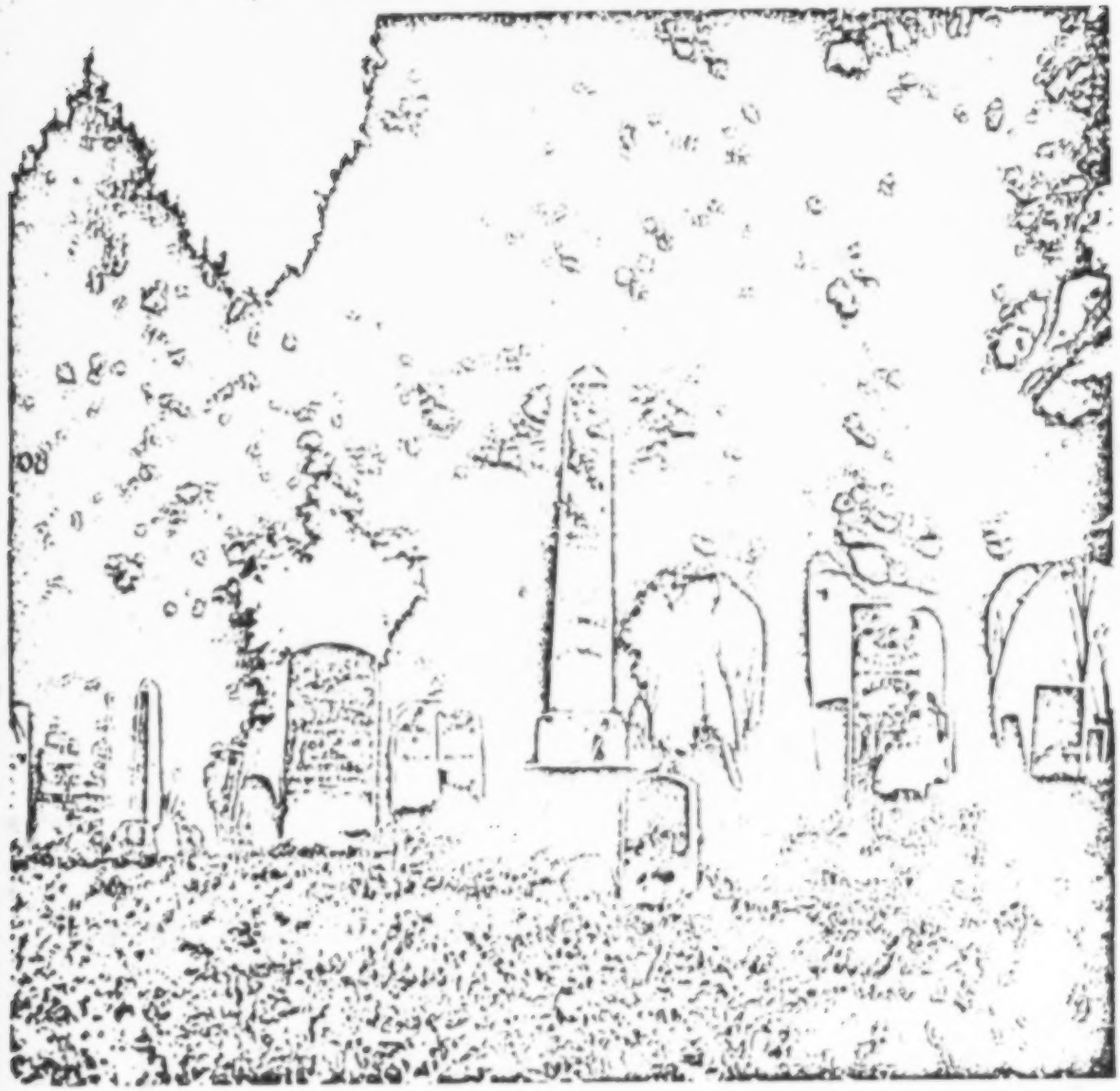
Mr. Ross: I don't have any further questions.

Miss Kunk: I don't have any further questions.

Judge Ries: All right, Mr. Lamb, thank you, you're excused.

(The witness was excused.)

The Retirement Program at Gordonsville Industries??



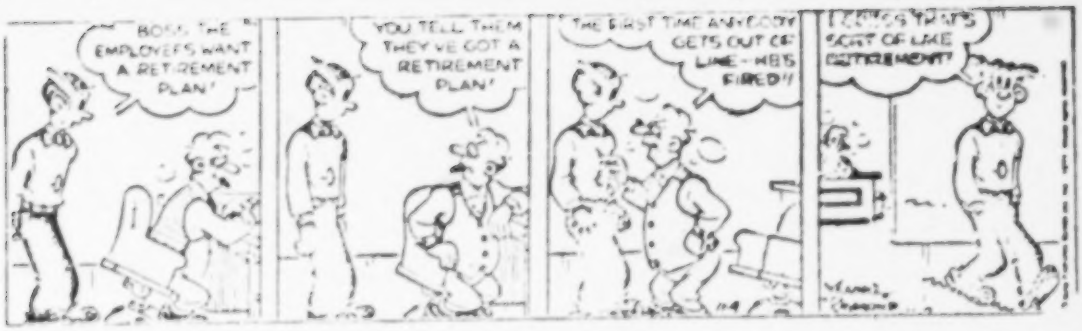
Is this one of the benefits Gordonsville Industries provides for us, its loyal workers, who have contributed so much to make the company as rich and prosperous as it is today? Is this the kind of retirement that we hourly workers can look forward to after a life-time of hard, underpaid work? According to government statistics more people than ever before will live for many years beyond the day they retire. Certainly the President and Executive Vice President of Liberty Fabrics have made provision for their own retirement. Is there any reason why we, too, should not have protection?

MAKE A CHANGE FOR THE BETTER
FOR 1978 AND FOR YOUR FUTURE

"YES"
X

Vote "YES"

APPENDIX N



WHOSE RETIREMENT ARE WE WORKING FOR?

The company would have us believe that if we serve Gordonsville Industries (Liberty Fabrics) faithfully for 30 years they will take care of us when we retire. Liberty Fabrics would have us believe they will make sure we have an income to provide a secure and decent retirement BUT the company has avoided providing us with information about our pension plan -- for good reason!

Documents that Liberty Fabrics is required to file with the U.S. Department of Labor tell a different story. What are the facts?

FACT: If you started work when the plant opened and earned a straight-time average wage of $4.00 an hour, you will be eligible for a pension of $40.67 a month in 1990. That isn't much for 30 years of service!

> BUT -- The President of Liberty Fabrics will receive a pension of $1,653 a month, or $19,836 per year under the same pension plan! (Get the picture?)

FACT: If you started work after 1972 you will not receive a pension from Liberty Fabrics no matter how long you work for the company! We have no minimum pension guarantee! The longer you work, the less you get, according to the pension formula on file with the Department of Labor by our company!

> BUT -- The Executive Vice President of Liberty Fabrics will receive a pension of $13,000 per year when he retires!

Why do the President and the Executive Vice President and other members of management get such a generous pension when we get nothing or very little? Let's take a look at the facts:

FACT: The only reason we have a pension at all (those of us who will get anything) at Gordonsville Industries is because the generous pensions management receives can be written off the corporate taxes! Under Federal Law, Liberty Fabrics cannot take a tax write-off on management pensions unless the employees also receive some kind of pension. Our pensions may just qualify this company for a tax break -- and, as you can see, we get very little while management has treated themselves royally!

FACT: ACTWU PENSION PLANS ARE IN WRITING FOR EVERY MEMBER TO HAVE A COPY OF! Management has to negotiate any pension changes with you, through your elected representatives. No more unilateral decisions by management just to benefit management!

• YOU BE THE JUDGE •

Do you want to continue with a pension plan that benefits only a few management people -- or is every employee at Gordonsville Industries entitled to a share?!

FOR DECENT AND SECURE PENSIONS
FOR YOURSELF AND YOUR FAMILY
VOTE "YES" ON TUESDAY, DECEMBER 6TH!

APPENDIX O

[LETTERHEAD OF GORDONSVILLE INDUSTRIES, INC.]

December 3, 1977

Dear

On December 31, 1976 the company made a contribution to your individual retirement account in the amount of

Contributions by the company to your account in future years will be made based on the profitability of the company.

The next contribution to your account will be made at the end of this year.

Sincerely,

GORDONSVILLE INDUSTRIES, INC.
Michael Gottlieb
President

Excerpt from the Annual Report of Liberty Fabrics of New York, Inc., for 1977, in the record below as Respondent's Exhibit 21:

NOTES TO FINANCIAL STATEMENTS (Continued)
Retirement Benefit Plans

The Company's Non-Contributory Profit-Sharing Plan covers all employees meeting the eligibility requirements. The Company may amend, modify or terminate the Plan, in whole or in part, at any time. Contributions to the Plan are discretionary and based on current and accumulated profits but may not be less than 5% of pre-tax book income, as defined in the Plan. The policy of the Company is to fund contributions so determined. Because of the establishment of the Profit-Sharing Plan, the Company's Non-Contributory Pension Plan, which covered the same employees, has been frozen, effective December 1, 1976, by discontinuing the accrual of future benefits to participants after such date. The Pension Plan assets at December 31, 1976 are greater than the actuarially computed value of vested benefits.

Retirement benefits costs under the Profit-Sharing Plan charged to operations amounted to approximately $198,000 (1977) and $118,000 (1976).

APPENDIX P

[LETTERHEAD OF LIBERTY FABRICS OF NEW YORK, INC.]

June 28, 1978

Dear Fellow Employee:

This will advise you of the status of the Union charges against your company. The Union claims that the company acted improperly:

By giving you a wage increase of 35¢ an hour last January;

By talking with you about the Union;

By terminating Nancy McDaniels and Steve Bolding;

And by making a survey of your needs and desires.

We feel we are right and did not act improperly as the Union claims. Now, the Union demands because of these issues that we be required to bargain with them even though you may have voted *NO UNION*.

We think that if you signed the Union Authorization card you were only asking for an election, with the right to vote YES or NO UNION. I am sure you did not expect a Union without an election to determine your choice.

The Union or the Labor Board may require that you attend a hearing in order to question you regarding the above issues. You may even be subpoenaed to appear at the hearing. If this happens we know you will respond honestly and responsibly.

We will keep you advised of further events as they occur in this situation.

Sincerely,

(s) Michael Gottlieb,
President.

Opposition

1

DICKSTEIN, SHAPIRO & MORIN
2101 L STREET, N.W.
WASHINGTON, D.C. 20037
202 785-9700
TELEX: 892608 DSM WSH

GEORGE KAUFMANN
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202 296-1294

Office - Supreme Court, U.S.
FILED
MAY 6 1982
598 MADISON AVENUE
NEW YORK, N.Y. 10022
212 832-1000
ALEXANDER L. STEVAS,
CLERK

May 6, 1982

Alexander L. Stevas
Clerk, Supreme Court of the United States
One Maryland Avenue, N. E.
Washington, D. C. 20543

Re: Gordonsville Industries, Inc. v. National Labor Relations Board and Amalgamated Clothing & Textile Workers Union (No. 81-1844)

Dear Mr. Stevas:

This is the response of respondent for Amalgamated Clothing and Textile Workers Union to the Petition for Writ of Certiorari in this case. I am submitting ten copies for distribution to the Court.

The lack of merit in the Petition for Certiorari is evidenced by the fact that so conscientious a panel as Judges Tamm, Robb and McGowan did not consider dismissal of Gordonsville's petition for review to require an opinion. Rather than burden the Court further, we join in the Brief in Opposition for the National Labor Relations Board.

Respectfully submitted,

Joel Ronald Ax

ARTHUR M. GOLDBERG
JOEL RONALD AX
Counsel of Record
SUSAN SCHEID
Amalgamated Clothing & Textile
Workers Union (AFL-CIO)
15 Union Square
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(212) 242-0700

George Kaufmann

GEORGE KAUFMANN
2101 L Street, N. W.
Washington, D. C. 20037
(202) 296-1294

cc: Rex E. Lee, Solicitor General
Norton J. Come, NLRB
John S. Greenbaum, Esq.
Frank J. Peterpaul, Esq.

Opposition

2

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1844

In the Supreme Court of the United States

OCTOBER TERM, 1981

GORDONSVILLE INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

STANDAU E. WEINBRECHT
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board reasonably concluded that a bargaining order was necessary to remedy petitioner's pervasive unfair labor practices.

2. Whether the Board correctly refused to supply to petitioner pretrial statements of employees unless and until they testified at the unfair labor practice hearing.

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Texaco, Inc. v. *NLRB*, 436 F. 2d 520 7

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 10

Statute and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

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Section 8(a)(3), 29 U.S.C. 158(a)(3) 5
Section 8(a)(5), 29 U.S.C. 158(a)(5) 6

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1844

GORDONSVILLE INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is not reported. The Board's decision and order (Pet. App. 4-160) are reported at 252 N.L.R.B. 563.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1982. A petition for rehearing was denied on February 12, 1982 (Pet. App. 3). The petition for a writ of certiorari was filed on April 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Amalgamated Clothing and Textile Workers Union ("the Union") began an organizing campaign at petitioner's textile plant with an employees' meeting on September 18, 1977. On September 23, the Union

asked petitioner for recognition based on the signing of authorization cards by a majority of the employees in the bargaining unit.[1] By letter to the Union dated September 27, 1977, petitioner declined to recognize the Union, and two days later the Union filed with the Board a petition for an election (Pet. App. 20).

Although petitioner had never previously conducted a survey of its employees' views on working conditions nor utilized a grievance procedure, upon learning of the union campaign it retained a personnel consulting firm, Southeastern Employers Service Corporation (SESCO), to conduct a survey of the views of its employees on working conditions and benefits (Pet. App. 21-26). After petitioner received the results of the survey, top management staff discussed the results with the employees in small groups. During conversations at several of the meetings, the employees were assured that petitioner's officials would work on the identified problems at the plant and that given time they could straighten things out (Pet. App. 24, 43-45).

During the course of the election campaign there were, in addition to the promises of efforts to improve conditions in connection with the survey, several instances of employer threats of loss of benefits, plant shutdown, and discharges. Petitioner also placed restrictions on union organizing activities, and harassed active union supporters (Pet. App. 27-43). One of the leaders of the union campaign, mechanic

---

[1]Because of the ambiguity of the dates on some of the cards, the Administrative Law Judge concluded that 22 of the cards should be considered only as having been signed prior to September 29. Excluding these cards, the Union had secured 165 cards on September 23, just short of a requisite majority of 167. By September 27, however, the Administrative Law Judge found that the Union had secured a majority, and by September 30, it had secured 199 valid cards for the 327 employees then in the bargaining unit, thus surpassing the number needed for a majority by 35 cards. See Pet. App. 142-144.

Stephen Bolding, was summarily discharged by petitioner, without recourse to ordinary investigation procedures, about a month before the election on the basis of a report of a minor altercation with another employee (Pet. App. 83-96).

On December 5, 1977, the day before the election, top management officials delivered to each employee a personalized form statement advising them of the amount of money that had allegedly been deposited as of December 31, 1976, to their account in a profit-sharing plan. Although petitioner asserted that the individual calculations had been made at least six months before, and that the plan had been established in 1976, the statement handed the employees the day before the election was the first announcement any of them had received of the existence of the plan (Pet. App. 46-57).

The election was held on December 6, 1977, with 144 votes for the Union, 143 against, and 58 ballots challenged (Pet. App. 58).[2] On December 20, 1977, at a time when the challenges to the election were pending, petitioner announced a 35-cent per hour wage increase for all its hourly employees, effective January 1, 1978 (*ibid.*). The effective date of the increase coincided with the effective date of a 35-cent per hour increase in the federally established minimum wage, but there had been no general wage increases coincident with the prior 1975 and 1976 increases in the minimum wage (*id.* at 62 n.25, 64-65).

A complaint was filed before the National Labor Relations Board charging petitioner with unfair labor practices in connection with the election. The hearing before the Administrative Law Judge on the complaint was scheduled

---

[2]Resolution of the challenged ballots ultimately resulted in a determination that the Union had lost the election.

to begin on July 24, 1978. On June 28, 1978, the Company sent a letter to each employee to "advise you of the status of the charges against your company" (Pet. App. 68-71). The letter included the following admonition (*id.* at 69):

> We think that if you signed the Union Authorization Card you were only asking for an election, with the right to vote YES or NO UNION. I am sure you did not expect a Union without an election to determine your choice.
>
> The Union or the Labor Board may require that you attend a hearing in order to question you regarding the above issues. You may even be subpoenaed to appear at the hearing. If this happens we know you will respond honestly and responsibly.

On June 29, another letter was sent to all employees informing them of a general wage increase of 25 cents per hour to be effective immediately following the vacation shutdown (*id.* at 71-73).

2. The Administrative Law Judge, subsequently upheld by the Board (Pet. App. 4-5 n.1), granted the General Counsel's motion to quash a subpoena from petitioner seeking production from the General Counsel of statements by card signers that the General Counsel had obtained in the course of his investigation of the case.[3] The General Counsel did supply petitioner with the statements of those employees who testified at the hearing. The Administrative Law Judge denied a motion to quash a subpoena issued by the General Counsel requiring the production of certain of petitioner's business records. That subpoena ultimately was

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[3]The statements were the responses to questionnaires (see Pet. App. 190-191) that the Board's Regional Office had sent to employees concerning the circumstances surrounding the signing of the employee's authorization card.

enforced by the United States District Court for the Eastern District of Virginia, Civ. No. 78-556A (Aug. 25, 1978) (unreported).

3. Adopting the decision of the Administrative Law Judge with minor modifications (Pet. App. 4-14), the Board found that petitioner had violated Section 8(a)(1) of the Act by soliciting grievances by means of the survey and the associated meetings with employees, and by its offers of benefits, threats, and harassment of employees intended to discourage union support and thwart organizational activity (Pet. App. 27-45). The Board further found that the discharge of employee Bolding was motivated by union animus and violative of Section 8(a)(3) (Pet. App. 95-96).

The Board also found that petitioner had violated Section 8(a)(1) of the Act in these additional respects:

(i) Petitioner's election-eve announcement of a profit-sharing plan was a benefit conferred and timed for the purpose of influencing the outcome of the election (Pet. App. 57, 145).

(ii)The wage increase, which was announced immediately after the election and at a time when a second election remained a possibility, was a departure from petitioner's existing wage policy and designed to undermine the Union and influence the voters in the event another election were held (Pet. App. 68).

(iii) The letter of June 28, 1978, was intended to influence testimony at the hearing in this case. The Administrative Law Judge explained that the apparent purpose of the admonishment in the June 28 letter concerning the signing of authorization cards was "to plant a seed in the minds of employee-witnesses as to the character of the testimony which they were expected to give under [petitioner's] watchful eye at the hearing" (Pet. App. 70).

(iv) The wage increase announced in the June 29 letter was intended to influence testimony by reminding the employees of the source of their benefits should they be called to testify (Pet. App. 73).

Finally, the Board found that a majority of the unit employees had designated the Union as their collective bargaining representative by valid authorization cards, and that petitioner's subsequent unfair labor practices, which were intended to and did undermine the Union's majority status, were of such a nature and gravity, and of such general application and pervasive character, that they would be likely to taint any rerun election that might be held (Pet. App. 145-146). Accordingly, the Board concluded that a bargaining order was an appropriate remedy, and that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union on and after September 27, 1977 (Pet. App. 144-149).

The court of appeals enforced the Board's order in full (Pet. App. 1-2).

ARGUMENT

1. Petitioner contends (Pet. 21-28) that the Board's bargaining order here, which was enforced by the court of appeals, violates the standards set out by this Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). This contention is without merit.

a. In *Gissel*, this Court sustained the Board's authority to issue bargaining orders, not only in "exceptional" cases marked by "outrageous" unfair labor practices, but also in cases where the unfair labor practices are "less pervasive," where the Board nevertheless finds "that the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies, though present, is slight and that employee sentiments once expressed through [authorization] cards would, on balance,

be better protected by a bargaining order." 395 U.S. at 614-615. Petitioner contends (Pet. 26-27) that a bargaining order was inappropriate here because the unfair labor practices were only "marginally or technically violative." The record, however, belies that characterization of petitioner's misconduct.

Petitioner accorded substantial benefits, including wage increases, to all of its employees both before and after the election. As the Administrative Law Judge noted (Pet. App. 145-146):

> Based on precedent, the wage increases alone would be sufficient predicate for a bargaining order, the Board holding that "[i]t is difficult to conceive of conduct more likely to convince employees that, with an important part of what they were seeking in hand, union representation might no longer be needed." *Tower Enterprises, Inc.*, 182 N.L.R.B. 382, 387; accord, *Skaggs Drug Centers, Inc.*, 197 N.L.R.B. 1240, [enf'd, 84 L.R.R.M. 2384 (9th Cir. Aug. 23, 1973)]; *Honolulu Sporting Goods Co., Ltd.*, 239 N.L.R.B. [1277]. It seems clear that this group of unfair practices * * * [are] beyond the curative powers of customary notice-posting, especially since the unlawful effects of the increases "cannot easily be erased, for the benefit remains in effect," *Red Barn Systems, Inc.*, 224 N.L.R.B. 1586.[4]

The Administrative Law Judge further found that the unlawful threats made by petitioner, including threats "of a

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[4]See also *NLRB* v. *Jamaica Towing, Inc.*, 632 F. 2d 208, 212-213 (2d Cir. 1980); *Pedro's, Inc., d/b/a Pedro's Restaurant* v. *NLRB*, 652 F. 2d 1005 (D.C. Cir. 1981); *NLRB* v. *Eagle Material Handling, Inc.*, 558 F. 2d 160, 166-168 (3rd Cir. 1977); *NLRB* v. *WKRG-TV, Inc.*, 470 F. 2d 1302 (5th Cir. 1973); *Texaco, Inc.* v. *NLRB*, 436 F. 2d 520 (7th Cir. 1971); *Raley's Inc.*, 236 N.L.R.B. 971 (1978), enf'd, 608 F. 2d 1374 (9th Cir. 1979). And see *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

plant shutdown, of employees being fired * * * and the threat of blacklisting" (Pet. App. 146), would "tend to have a lingering coercive impact on the decision by employees whether to opt for the Union" (*ibid.*). These violations plainly were even more serious than those found in the companion case to *Gissel, Sinclair Co.* v. *NLRB* (see 395 U.S. at 587-590), where this Court unanimously upheld the Board's bargaining order on the basis of threats of plant closure standing alone.

The Administrative Law Judge also relied upon the "wrongful discharge of Bolding," pointing out that "[t]he abrupt disappearance of Bolding, a notable Union adherent, from the payroll a month before the election has likely had a seriously sobering effect upon the employees; the potential of his reinstatement to work several years thereafter would not be a very consoling prospect to employees pondering whether to involve themselves in a renewed effort to elect the Union" (Pet. App. 147).

These unfair labor practices were serious violations of the Act that justify the imposition of a bargaining order on the basis of the authorization cards. And, contrary to petitioner's contention (Pet. 18-20), the Administrative Law Judge's decision, adopted by the Board, supplied a detailed articulation of the reasons why other traditional remedies would not adequately remove the effects of these unfair labor practices so as to permit a fair rerun election.

b. Petitioner's contention (Pet. 27-28) that the Board did not consider the lapse of time as militating against a bargaining order is without foundation. The Administrative Law Judge noted (Pet. App. 147):

> [A]s a result of this proceeding, which presumably will receive considerable publicity at the plant, it has been and will be brought home, not only to 1977 employees but also to 1979 ones, that [petitioner's] agents manifested a willingness to violate the law in order to keep

> the union out. That knowledge would tend both to dampen the enthusiasm of employees for the union in the polling booth and to inhibit prudent employees from participating in the important work of preelection proselytizing for the Union.

Moreover, this Court recognized in *Gissel* that, in the case of employer unfair labor practices undermining an election, "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct * * * and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign." 395 U.S. at 612; footnote omitted. This *status quo ante* objective of a bargaining order has been sustained by this Court against a lapse of time contention in *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962), notwithstanding employee attempts in that case to repudiate the union during the interval before entry of the Board's order. See also *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704-705 (1944); *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1942).

c. Petitioner's challenge (Pet. 21-24) to the reliability of authorization cards as a means of establishing the majority status of the Union was considered and rejected by this Court in *Gissel*, 395 U.S. at 601-610. As the Court concluded there (*id.* at 602):

> The acknowledged superiority of the election process * * * does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice.

The Administrative Law Judge correctly assessed the validity of the cards here against the standards established in *Gissel* (Pet. App. 117-119).[5]

2. Petitioner contends (Pet. 8-14) that the General Counsel violated due process in failing to supply petitioner with the questionnaire responses of employees who did not testify at the hearing. This contention is without foundation.

In *Ra-Rich Mfg. Corp.*, 121 N.L.R.B. 700, 701-702 (1958), the Board, in conformity with the decision of the Second Circuit in *NLRB* v. *Adhesive Products Corp.*, 258 F. 2d 403 (1958), applied to Board proceedings the rule established in *Jencks* v. *United States*, 353 U.S. 657 (1957), that the prosecution in a criminal case must make available to the defense pretrial statements of prosecution witnesses. See also 29 C.F.R. 102.118(b). *Jencks*, however, applies only to witness statements; it does not apply to all statements that might be useful in impeaching the testimony of a witness. Indeed, the Second Circuit has specifically approved the Board's procedure of not releasing pretrial statements unless and until a witness testifies at the hearing. *NLRB* v. *Lizdale Knitting Mills, Inc.*, 523 F. 2d 978, 980 (1975).[6]

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[5]Petitioner's further contention (Pet. 21-23 nn.17-20) that the cards of certain employees were not properly authenticated raises only factual issues that do not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the Administrative Law Judge's detailed authentication of the cards is amply supported by the record. See Pet. App. 121-144.

[6]Petitioner's reliance (Pet. 13-14) on *Brady* v. *Maryland*, 373 U.S. 83 (1963), is completely misplaced. While a prosecutor in a criminal case has a duty to supply exculpatory material to a defendant, petitioner cites no authority suggesting that *Brady* applies to a civil administrative proceeding. Clearly, the General Counsel was not required to supply petitioner with statements made by non-witness employees—which they might well have wanted to keep private from their employer—solely because of petitioner's hope that the statements might be useful in impeaching other witnesses. See *North American Rockwell Corp.* v. *NLRB*, 389 F. 2d 866, 873 (10th Cir. 1968).

Nor is there merit to petitioner's additional contention (Pet. 13, 14-16) that it was entitled to enforcement of its subpoena because the Board's subpoena was enforced. The materials sought by the two subpoenas were significantly different. The records subpoenaed by the General Counsel were business records that are routinely available in response to subpoenas. The records sought by petitioner from the General Counsel, however, were statements of potential witnesses obtained in preparation for trial and were attorney work product. Moreover, there is a legitimate governmental interest requiring protection of such statements—*i.e.*, because of the fear of reprisal from employers or unions, employees and others would be reluctant to furnish information to the Board without the assurance that it will not be disclosed unless and until they testify at a formal hearing. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-242 (1978); *NLRB* v. *Lizdale Knitting Mills, supra*. This interest was surely implicated here where the Board found that petitioner unlawfully attempted to influence the employees' testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1844

SUPREME COURT OF THE UNITED STATES

October Term, 1981

GORDONSVILLE INDUSTRIES, INC. - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION - - - - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

ARGUMENT IN REPLY

Counsel for the National Labor Relations Board "NLRB") makes egregious errors which require correction when he states in Section 2 of his Brief, as a rationalization for withholding admittedly relevant questionnaires at the hearing, that the questionnaires are (a) "attorney work product" (an assertion that has no factual basis), and (b) statements of potential witnesses who need protection. (Br. 11).

A. Due Process Questions.

There is no need to repeat reasons why *Jencks* v. *United States,* 353 U. S. 658 (1957) and *NLRB* v. *Adhesive Products Corp.,* 258 F. 2d 403 (2nd Cir. 1958) require production of the numerous, directly relevant

questionnnaires (statements) of employees, whose authorization cards were the material subject of testimony below.

The Eighth Circuit in *NLRB* v. *Selwyn Shoe Manufacturing Corporation,* 428 F. 2d 217 (8th Cir. 1970) correctly denied enforcement of an NLRB order that an employee be reinstated when a notebook of the employee containing material relevant to the circumstances of her discharge was not delivered by General Counsel to a Respondent who attempted to obtain the notebook at the hearing.[1]

Counsel for the Board, citing *Brady* v. *Maryland,* 373 U. S. 83 (1963), appears to concede that, if the instant case had been a criminal proceeding, the prosecutor would have been under an obligation to furnish to the defense the materials at issue herein. (Br. 11 n.6).

North American Rockwell Corp. v. *NLRB,* 389 F. 2d 866 (10th Cir. 1968), contrary to Counsel's assertion, does not decline to apply *Brady* to administrative proceedings. On the contrary, *North American Rock-*

[1]Authority cited by Counsel for the Board from another Circuit is not apposite. *NLRB* v. *Lizdale Knitting Mills, Inc.,* 523 F. 2d 978 (2d Cir. 1970) holds only that the Respondent in an unfair labor practice proceeding has no absolute right to pretrial discovery absent a specific showing of need or of prejudice if discovery is not granted. In the instant case Petitioner's request for the questionnaires was made at numerous times in the course of the hearing when their existence became known and when their relevancy became obvious. Seeking to have specific relevant evidence produced at a hearing differs vastly from a request for general pretrial discovery. Denial of the questionnaires was admittedly prejudicial.

well holds that while *Brady* does not entitle a Defendant in any form of proceeding, criminal or administrative, to engage in a fishing expedition and make an "any and all" request which would require a prosecutor to search his files for "bits and pieces of evidence which conceivably could be favorable to the defense" (at 873), there is probable applicability of both *Jencks* and *Brady* to NLRB cases.

Brady was decided as the result of a criminal proceeding, but the reasons against a prosecutor's suppression of relevant evidence favorable to a Defendant must obviously apply in all proceedings where the government is a prosecutorial adversary and where punitive judicial sanctions can be an end result of the proceedings.[2]

B. Erroneously Asserted NLRB "Privilege".

The Petition for a Writ of Certiorari herein indicates why government assertion of "confidentiality" or "privilege" must not be allowed to abrogate Due Process. The case of *NLRB* v. *Robbins Tire and Rubber Co.*, 437 U. S. 214 (1978) decided under the *Freedom of Information Act* ("FOIA") 5 U.S.C. §551, *et seq.*, held that because the NLRB asserted existence of a theoretical danger of pre-trial interference with witnesses by employers, prehearing FOIA disclosure

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[2]See for example: *In Re: Winn-Dixie Stores, Inc.*, 386 F. 2d 309 (5th Cir. 1967); *NLRB* v. *Savoy Laundry, Inc.*, 354 F. 2d 78 (2d Cir. 1965); and *NLRB* v. *Interurban Gas Corporation*, 401 F. 2d 744 (6th Cir. 1968) in which employers were held in criminal contempt and incarcerated for violation of NLRB orders.

of witnesses' statements could "interfere" with NLRB enforcement proceedings within the meaning of Section 552(b)(7) of the FOIA. However, *Robbins*, a FOIA case, is not a justification of refusal to provide materials during a NLRB hearing when Due Process is a continuing requirement.

Moreover, the basis the NLRB relied upon for withholding pre-trial witnesses' statements under *Robbins* (protecting employees from "reprisal by employers or unions") has no application to the questionnaires in the instant case:

> 1. The identity of the employees completing a questionnaire was voluntarily disclosed by the NLRB at the hearing.
>
> 2. The fact that an employee allegedly signed a union authorization card (the subject matter of the questionnaire) was voluntarily disclosed by the NLRB at the hearing.
>
> 3. The circumstances under which the employee allegedly signed the card (the subject matter of the questionnaire) was voluntarily disclosed by the NLRB at the hearing.
>
> 4. Contrary to customary NLRB practice with respect to pre-trial statements, the questionnaire does not contain any representation of confidentiality, nor does the record indicate that any signer of a questionnaire expected confidentiality.
>
> 5. The union itself solicited completion of questionnaires.

It is obvious that concealing the contents of the questionnaire of an employee whose activities in al-

legedly signing a union authorization card are detailed in the record cannot in any conceivable way provide him allegedly needed protection. The NLRB certainly did not act out of any solicitous desire to protect employees when at the hearing it callously disclosed the identity of all employees signing the cards.

Due Process should not be abrogated here. An employer has the right to challenge whether or not union cards reflect employee desires.[3]

Respectfully submitted,

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[3]See *NLRB* v. *Keystone Pretzel Bakery*, __ F. 2d __ (3rd Cir. 1982) (No. 81-2067, April 1, 1982) where Judge Gibbons reflecting the deep current need for judicial clarification of the "Gissel Doctrine" in a dissenting Opinion stated:

> The ingenuity with which an aggressive minority of judicial activists on this Court continues to carry on its guerrilla warfare against the Supreme Court's interpretation of the National Labor Relations Act in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), continues to amaze me.